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TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1940

No. 48

STATE OF WISCONSIN AND ELMER E. BARLOW,
AS COMMISSIONER OF TAXATION OF THE
STATE OF WISCONSIN, PETITIONERS,

vs.

MINNESOTA MINING AND MANUFACTURING
COMPANY

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE
OF WISCONSIN

PETITION FOR CERTIORARI FILED APRIL 10, 1940

CERTIORARI GRANTED MAY 20, 1940.

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STATE OF WISCONSIN
IN SUPREME COURT

AUGUST TERM, 1939.

No. 98

MINNESOTA MINING AND MANUFACTUR-
ING COMPANY,

Appellant,

vs.

WISCONSIN TAX COMMISSION,

Respondent.

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This is an appeal from an order or judgment of the Circuit Court for Dane County, Wisconsin, Honorable August C. Hoppmann presiding, entered on the 10th day of June, 1939, confirming the order of the Wisconsin Tax Commission dated December 19, 1938, and the privilege dividend tax imposed upon dividends declared by the Minnesota Mining and Manufacturing Company on January 2, 1936, April 1, 1936, July 1, 1936, October 1, 1936 and December 22, 1936.

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1-95 Record Before Tax Commission and Return to Circuit Court on Appeal (Included in subsequent portion of printed case).

95-124 NOTICE OF APPEAL TO CIRCUIT COURT.

(Omitting signatures.)

95 To the Wisconsin Tax Commission, Madison, Wisconsin.

PLEASE TAKE NOTICE that the Minnesota Mining and Manufacturing Company hereby appeals to the Circuit Court for Dane County, Wisconsin, from the whole of the decision of the Wisconsin Tax Commission which was served by registered mail upon the appellant on January 4, 1939, and which bears date of the 19th day of December, 1938, a copy of which said decision is hereto attached, marked "Exhibit I" and is hereby referred to and made a part of this notice.

OBJECTIONS TO ORDER AND DECISION AND TO ASSESSMENT.

The objections to said order and decision and to the assessment made are stated as follows:

(1) The assessment and decision are void and of no effect whatsoever by reason of the fact that the purported law on which said assessment and purported tax is based is unconstitutional both under the Constitution of the United States of America and the Constitution of the State of

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Wisconsin, and particularly under the Fourteenth Amendment of the Constitution of the United States of America; Article I, Section 1, Constitution of the State of Wisconsin; Article I, Section 8, Constitution of the United States of America; Article I, Section 10, Constitution of the United States of America; Article I, Section 8, Constitution of the State of Wisconsin; Article I, Section 12, Constitution of the State of Wisconsin; Article IV, Section 1, Constitution of the United States of America.

(2) That said assessment, insofar as it includes any so-called dividends on treasury stock of the Minnesota Mining and Manufacturing Company as a part of the base on which the alleged dividend tax is computed, is void and of no effect whatsoever by reason of the fact that the law did not contemplate that dividends on treasury stock should be included in such base.

(3) That said assessment, insofar as it includes earnings upon federal instrumentalities and the interest derived thereon of the Minnesota Mining and Manufacturing Company as a part of the base upon which the alleged privilege dividend tax is computed, is void and of no effect whatsoever under Article I, Section 8 of the Constitution of the United States of America.

(4) That said assessment, insofar as it includes the investment income of the Minnesota

Mining and Manufacturing Company, having no taxable situs in Wisconsin, as a part of the base upon which the alleged privilege dividend tax is computed, is void and unconstitutional under the Fourteenth Amendment of the Constitution of the United States of America.

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(5) That said assessment, insofar as it includes royalty income of the Minnesota Mining and Manufacturing Company, having no taxable situs in Wisconsin, as a part of the base upon which the alleged privilege dividend tax is computed, is void and unconstitutional under the Fourteenth Amendment of the Constitution of the United States of America.

(6) That said assessment is void and of no effect whatsoever in that the Minnesota Mining and Manufacturing Company, when it distributed the \$1,679,952.55 in the year 1936, was not distributing the \$218,842.45 earned by it in the State of Wisconsin.

**STATEMENT OF FACTS UPON WHICH
APPELLANT RELIES AS CONSTITU-
TING BASIS OF THIS APPEAL.**

From the record herein made before the Wisconsin Tax Commission it appears that the Minnesota Mining and Manufacturing Company is a Delaware corporation, engaged in the business of manufacturing in the States of Minnesota, Michigan, Ohio and Wisconsin, and sells its products so manufactured in every state in the Union and

in foreign countries. The statutory principal office of the company is Wilmington, Delaware. All stockholders' meetings are held in St. Paul Minnesota. The principal business office at which all meetings of the directors are held is in St. Paul, Minnesota. The said Minnesota Mining and Manufacturing Company is qualified to do business in the State of Wisconsin, but has no executive office of any kind located within the State of Wisconsin.

Under the formula used by the Tax Commission the total adjusted net income for the year 1935 was \$2,007,460.30. The correct adjusted net income for the year 1935 should be \$2,155,116.96, for under the decision the position of the Minnesota Mining and Manufacturing Company in reference to Braeder-Adamson Paper Mills, Inc., loss was well taken.

The amount of net income allocable to Wisconsin under the formula used by the Wisconsin Tax Commission for the year 1935 was \$261,157.62.

98 The percentage of the total net income allocable to Wisconsin on the basis of the formula so used by the Wisconsin Tax Commission was 13.0093% for the year 1935. The percentage should have been found to be 12.1180% for the year 1935. Using the formula of the Wisconsin Tax Commission it resulted in a tax of \$5,471.06 and interest to March 1, 1939, amounting to \$894.52.

On January 2, 1936, the Minnesota Mining and Manufacturing Company declared a dividend on all of its outstanding shares of stock and paid a

total of \$215,909.83 in dividends, exclusive of the so-called dividends on shares held in the treasury, and made payment of \$371.25 upon said treasury stock on that date. On April 1, 1936, the Minnesota Mining and Manufacturing Company paid a dividend on all outstanding shares of stock amounting to \$216,380.97. On July 1, 1936, the Minnesota Mining and Manufacturing Company paid a dividend on all outstanding shares of stock amounting to \$288,278.00. On October 1, 1936, the Minnesota Mining and Manufacturing Company paid a dividend on all outstanding shares of stock amounting to \$336,441.00. On December 12, 1936, the Minnesota Mining and Manufacturing Company paid a dividend on all outstanding shares of stock amounting to \$624,819.00.

The Minnesota Mining and Manufacturing Company, believing said privilege dividend tax to be void, did not make a return of the dividends paid prior to January 1, 1937, and on August 13, 1937, the Wisconsin Tax Commission duly notified the Minnesota Mining and Manufacturing Company that it owed a privilege dividend tax of \$6,382.75 with interest amounting to \$501.01 computed to September 30, 1937. This assessment was made pursuant to Chapter 505 of the Wisconsin Session Laws for 1935, effective September 26, 1935, as amended by Chapter 552 of the Wisconsin Session Laws for 1935, effective October 9, 1935, and the percentage of the 1935 income allocable to Wisconsin was 14.8010%.

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amended application for hearing on said assessment within the period prescribed by law. Hearing was had on the application and amended application for hearing, resulting in entry by the Wisconsin Tax Commission of the decision from which this appeal is taken.

There follows a recitation of certain of the details with respect to the Minnesota Mining and Manufacturing Company's manner of conducting its operations and disbursing its funds. On each of the dates fixed as the record date for determination of the stockholders entitled to receive each of the dividends upon which a privilege dividend tax has been assessed against the company there have been in excess of 1961 stockholders residing in practically every state in the Union, owning an aggregate of 961,260 shares of common stock. On each of said dates the number of stockholders residing in the state of Wisconsin has been not greater than 42 and the number of shares held by such stockholders have been not greater than 3,006. That the Minnesota Mining and Manufacturing Company has no preferred stock outstanding.

All meetings of the board of directors of the company at which dividends were declared were held in the State of Minnesota, and all acts of the company or its agents in connection with the declaration and payments of dividends was performed within and pursuant to the laws of the States of Minnesota and Delaware, and the funds out of which said dividends were paid were kept

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in the State of Minnesota. No act or transaction connected with the declaration and payment of said dividends was done or performed within the state of Wisconsin, with the sole exception that certain dividends so declared and paid amounting in the case of each of the dividends to which this appeal relates to less than one-third of 1% of all 100 dividends declared and paid, were received by stockholders of the Minnesota Mining and Manufacturing Company residing in the State of Wisconsin.

All of the gross income of the Minnesota Mining and Manufacturing Company's factory in Wisconsin during the time involved in this appeal was handled as follows: That the factory at Wausau, Wisconsin, shipped all of its products to points South, East and West. That sales of said products are made by the Chicago office of the Minnesota Mining and Manufacturing Company, and the proceeds of such sales are remitted by the purchaser directly to the St. Paul office of the Minnesota Mining and Manufacturing Company and deposited by it in banks in St. Paul, Minnesota. That all books and records covering the Wisconsin factory of the Minnesota Mining and Manufacturing Company are kept in St. Paul, Minnesota. That all wages of the Minnesota Mining and Manufacturing Company employees of Wisconsin are paid directly from St. Paul, Minnesota. That the receipts from the Wausau factory of the Minnesota Mining and Manufacturing Company are co-mingled with the earnings

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from the Minnesota Mining and Manufacturing Company's factories at St. Paul, Minnesota, Detroit, Michigan, and Copley, Ohio, and with earnings from companies in which the Minnesota Mining and Manufacturing Company owns a substantial amount of stock, earnings from doing business in foreign countries, earnings from royalties, dividends and from stocks owned by the Minnesota Mining and Manufacturing Company, and interest from federal and other bonds owned by the Minnesota Mining and Manufacturing Company, and after payment of salaries, overhead and taxes, dividends are declared and paid from this fund. That all stock records are kept and dividends are paid by the First Trust Company of St. Paul, which acts as transfer agent and paying agent of the Minnesota Mining and Manufacturing Company. Dividends are not paid out of income received from any particular source or earned in any ascertainable period, but are paid 101 out of the general fund of the Minnesota Mining and Manufacturing Company. Regardless of when earned or from where earned, the dividend payment is made by drawing a check or checks for the amount to the order of the First Trust Company of St. Paul, which itself makes actual payment to the stockholders by mailing the same in the regular course of mail from St. Paul, Minnesota, to the respective addresses of the stockholders, at the dates fixed by the board of directors. That the Minnesota Mining and Manufacturing Company at no time deducted any of the

alleged taxes from the dividends paid to its stock-holders.

The application for hearing and the proofs before the Tax Commission at the hearing showed in tabulated form the amounts received by Wisconsin residents upon the payment of the dividends in question, the portion of such amounts received by Wisconsin residents allocable to Wisconsin earnings (based on the computation used by the Tax Commission in reaching assessments), and the tax on amounts received by Wisconsin residents allocable to Wisconsin earnings (on basis of figures originally used by the Tax Commission).

Dividend

Date	(1)	(2)	(3)
1/2/36	\$215,909.83 x .3127	\$ 675.15 x 2.5%	\$ 16.88
4/1/36	216,380.97 x "	676.62 x "	16.92
7/1/36	288,278.00 x "	901.45 x "	22.54
10/1/36	336,441.00 x "	1,052.05 x "	26.30
12/22/36	624,819.00 x "	1,953.81 x "	48.85
		Total	\$131.49

- (1) represents the total amounts received by the Wisconsin residents on the payments of the respective dividends.
- (2) represents the portion of such amounts received by Wisconsin residents allocable to Wisconsin earnings based on the percentages finally determined to be used by the decision of the Wisconsin Tax Commission.
- (3) represents the tax on amounts received by Wisconsin residents allocable to Wisconsin earnings.

102. The record before the Commission further contains undisputed proof that compliance with the statute would require the appellant to perform numerous clerical operations in the State of Minnesota each time a dividend is paid, all resulting in additional expense to the Minnesota Mining and Manufacturing Company.

The privilege dividend tax was computed by the Tax Commission on the theory that there were paid \$1,681,828.80 in dividends. The dividends actually paid were \$1,679,962.25. The difference is accounted for by the dividends on Minnesota Mining and Manufacturing Company treasury stock. Thus a tax of \$46.60 was illegally assessed against the Minnesota Mining and Manufacturing Company.

Effect of failure to deduct from dividends interest from federal securities:

Total dividends	\$1,679,962.55
Less federal interest distributed	10,191.37
	<hr/>
	\$1,669,771.18

Percent dividend taxable	12.1180
Taxable dividend	202,342.87
Rate of tax	2.50
Amount of tax	5,058.57

Effect of failure to deduct interest and dividends which intangibles have a taxable situs outside the State of Wisconsin:

Total dividend	\$1,669,771.18
Less interest & dividends distributed	355,394.65
	<hr/>
	\$1,314,376.53

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Percent taxable	12.1180
Taxable dividend	\$159,276.15
Rate of tax	2.50
Amount of tax	3,981.90

103 Effect of failure to deduct royalties:

Total dividends	\$1,314,376.53
Royalty distribution to stock-holders	154,223.33
<hr/>	
	\$1,160,153.20

Percent taxable	12.1180
Taxable dividend	140,587.36
Rate of tax	2.50
Amount of tax	3,514.60

The Minnesota Mining and Manufacturing Company does not maintain a separate system of accounts for its operations at Wausau. The following is a statement of its assets and liabilities in use at Wausau at the end of the years 1934, 1935 and 1936:

ASSETS

	Dec. 31, 1934	Dec. 31, 1935	Dec. 31, 1936
Cash	4,830.42	8,645.82	6,769.06
Real Estate	12,364.00	12,664.00	14,148.55
Buildings	189,420.87	361,149.46	370,084.52
Machinery	333,790.69	351,575.96	356,828.82
Colorquartz Machinery	179,259.66	256,736.74	257,004.25
Inventory	93,742.75	194,868.45	266,509.27
Total Assets	\$813,408.39	\$1,185,640.43	\$1,271,344.47

LIABILITIES

Reserve for Depre-			
ciation — Build-			
ings	6,437.48	17,448.90	32,073.59
Reserve for Depre-			
ciation — Ma-			
chinery	25,714.09	59,182.01	94,545.03
Reserve for Depre-			
ciation — Color-			
quartz	14,863.36	36,868.60	62,435.29
Net Earnings	7,999.84	266,494.25	449,042.97
Accrued State			
Income Tax		2,663.21	3,635.80
Net Advances by			
St. Paul	758,393.62	802,983.46	629,611.79
 Total Liabilities	\$813,408.39	\$1,185,640.43	\$1,271,344.47

104 In December, 1939, the taxpayer commenced operations of its Wausau plant. It made no income in Wisconsin that year or any prior years. In 1930 the total net income of the taxpayer from Wisconsin was \$2,396.37, and its income from all sources was \$685,707.54 and paid dividends to its stockholders in the year 1931 of \$548,178.60. In the year 1931 the Wisconsin income of the taxpayer was \$11,527.69; its total income from all sources was \$649,447.09; and it paid dividends in 1932 of \$500,001.66. In the year 1932 the taxpayer sustained a net loss of \$920.76 on its Wisconsin operations; it had a total income from all sources of \$448,588.07; and it paid dividends in 1933 of \$381,074.08. In 1933 the taxpayer had a net income in Wisconsin of \$10,212.72; its total

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income from all sources was \$899,829.21; and it paid dividends in 1934 of \$566,671.61. In 1934 the taxpayer sustained a net loss of \$15,216.23 on its Wisconsin operations; it had a net income from all its operations of \$1,203,820.30; and it paid dividends in 1935 of \$690,738.54.

Prior to January 1, 1935, using as a basis the formula of privilege dividend tax law as to distribution of Wisconsin earnings, the taxpayer had distributed to its stockholders in dividends prior to January 1, 1935, all of its Wisconsin earnings. In 1935 its net earnings were \$245,941.39, and a privilege dividend tax was originally imposed upon earnings of \$248,927.48. By this decision the Wisconsin earnings were reduced to \$218,842.45. They should be \$202,342.87.

Another factor to be considered is the method used by the Tax Commission of allocating a part of the total dividends paid to Wisconsin upon the basis of the proportion of the total net income earned in Wisconsin to total income from all sources for the prior year. According to the Tax Commission's figures, the taxpayer had surplus available for dividends in Wisconsin of \$7,999.84 at the end of 1934. Based upon the ratio of the 105 total earnings in Wisconsin for 1934 to total earnings everywhere, the dividends paid in 1935 would be about \$4,500.00. Using the 14.8010 percentage as applied to the 1936 dividends, the taxpayer would have left out of the 1935 surplus approximately \$10,000. Using the ratio of income in Wisconsin to total income for 1936 and applying this ratio to the dividends paid for 1937, the

taxpayer would have used up all of its surplus at the end of 1936, except some \$40,000. During the year of 1938 it might sustain a loss on its Wisconsin business, but based upon the ratio of 1937 earnings, a certain proportion of the taxpayer's dividends paid in 1938 would be taxable in Wisconsin, which might easily result in an excess amount of dividends being allocated to Wisconsin than the amount of earnings available for distribution from Wisconsin business.

In other words, it cannot be said that earnings for one year in Wisconsin have any relation to the dividend policy of a succeeding year, where a business is as diversified as the taxpayer's.

The record further affirmatively shows that full disclosure has been made to the Wisconsin Tax Commission of all income received by the company and all dividends paid by it, during the period involved on this appeal.

Under date of December 19, 1938, the Wisconsin Tax Commission rendered its decision, a copy of which is attached hereto, marked "Exhibit I", wherein it ordered that the assessment was properly made and that the same should be recomputed on a straight basis of $2\frac{1}{2}\%$ rather than at a .02564%, the rate originally used by the Tax Commission, and also ordered that it should be recomputed so that the dividends on treasury stock should be subjected to the tax, and also ordered that it should be recomputed so that the loss sustained by the Minnesota Mining and Manufacturing Company in Baeder-Adamson Paper

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106 Mills, Inc., not be used as a base, and that the ratio of the Wisconsin income to total income should be figured at 13.0093% instead of 14.8010%. It is from this order and decision that the Minnesota Mining and Manufacturing Company appeals. The recompilation of tax as ordered by the decision is reflected in Exhibit II attached hereto.

ASSIGNMENTS OF ERROR

(1) The Wisconsin Tax Commission erred in deciding and ordering that the assessment, or any part thereof, was valid and in ordering that the assessment, as recomputed, be placed on the tax rolls.

(2) That the Wisconsin Tax Commission erred in its finding and decision that the Wisconsin privilege dividend tax law was constitutional as applied to any of the dividends paid by the Minnesota Mining and Manufacturing Company as involved in this appeal.

(3) That the Wisconsin Tax Commission erred in any event in determining that the Wisconsin privilege dividend tax was constitutional so far as its application to payment of dividends to such stockholders as are non-residents of Wisconsin.

(4) That the Wisconsin Tax Commission erred in its finding and decision that the assess-

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ment should be revised to subject to tax dividends on treasury stock, and in ordering a computation of the tax on any base which includes dividends on treasury stock.

(5) That the Wisconsin Tax Commission erred in refusing to pass on the constitutionality of the Wisconsin privilege dividend tax as applied to the Minnesota Mining and Manufacturing Company.

(6) That the Wisconsin Tax Commission erred in its finding and decision to subject interest from federal securities to the privilege dividend tax and ordering a computation of the tax on any base which includes interest from federal securities.

107 (7) That the Wisconsin Tax Commission erred in its finding and decision to subject interest and dividends from intangibles which have a tax situs outside of the State of Wisconsin to a privilege dividend tax and ordering a computation of the tax on any base which includes such dividends from intangibles which have a tax situs outside of the State of Wisconsin.

(8) That the Wisconsin Tax Commission erred in its finding and decision to subject income from royalties which have a tax situs outside of the State of Wisconsin to the privilege dividend tax and ordering a computation of the tax on any base which includes income from royalties which have a tax situs outside of the State of Wisconsin.

(9) That the Wisconsin Tax Commission erred in deciding that when the Minnesota Mining and Manufacturing Company distributed \$1,679,952.55 in the year 1936, it was distributing \$218,842.45 earned by it in the State of Wisconsin.

PROPOSITIONS OF LAW RELIED
UPON BY TAXPAYER IN THIS AP-
PEAL.

(1) Section 3 of Chapter 505 of the Wisconsin Session Laws of 1935 and amendments thereto is unconstitutional under Section 1 of the Fourteenth Amendment of the Constitution of the United States of America and Article I, Section 1 of the Constitution of the State of Wisconsin, in that it deprives the Minnesota Mining and Manufacturing Company and/or its stockholders of property without due process of law because it attempts to levy an excise tax upon the privilege of paying and receiving dividends out of income derived from property located and business transacted in Wisconsin, when no act in connection with the payment and receipt of such dividends took place within the State of Wisconsin, except the receipt of such dividends as were paid to Wisconsin stockholders.

108 Furthermore, the funds from which such dividends were paid cannot be said to be Wisconsin funds, but are general funds of the company deposited in St. Paul banks and derived from remittances from purchasers from the earnings

from earnings from the St. Paul, Minnesota, Detroit, Michigan, and Copley, Ohio, factories of the company, earnings from companies in which the taxpayer owns a substantial amount of stock, earnings from doing business in foreign countries, earnings from royalties, dividends from stock owned by the company, interest from bonds owned by the company, interest from federal instrumentalities, none of which have a taxable situs in the State of Wisconsin.

That the State of Wisconsin has no power to levy any excise tax on the privilege of receiving and paying out dividends since said privilege is not granted by and could not be constitutionally be denied by the State of Wisconsin, such privilege being granted under the laws of the States of Delaware and Minnesota and exercised pursuant to the laws of such states.

That even if said law might be held to be constitutional from a jurisdictional standpoint insofar as it levies a tax upon dividends of foreign corporations paid to and received by Wisconsin residents within the state and/or to dividends paid by Wisconsin corporations, said act so applied would be contrary to Section 1 of the Fourteenth Amendment of the Constitution of the United States of America and Article VIII, Section 1, of the Constitution of the State of Wisconsin, since it would be a denial of equal protection of the laws to residents of Wisconsin and as to Wisconsin corporations it would not be uniform and would contain unreasonable exemptions.

That the tax is on the payment and receipt of dividends and that as it is in part levied upon an unconstitutional subject and as no basis for apportionment exists, the whole assessment is invalid.

109 That it is apparent from the structure of Section 3 of Chapter 505 of the Wisconsin Session Laws of 1935 and amendments thereto, under which this tax is assessed, that the legislature contemplated that a tax would be imposed upon all dividends paid from earnings derived from business and property within the state. To restrict the application of the law to dividends received within the State of Wisconsin would so alter and restrict it that it is apparent the legislature would not have passed it in so limited a form. Consequently the entire law is ineffective, notwithstanding the provisions of Section 4 of Chapter 505 of the Laws of 1935 and amendments thereto.

That even if the tax might be held to be valid insofar as it levies a tax on dividends paid to and received by Wisconsin residents within the state, it is invalid insofar as it purports to levy a tax on dividends paid and received outside of Wisconsin by non-residents of Wisconsin. In such cases the entire payment and receipt of said dividends takes place outside of the State of Wisconsin, and consequently said state has no jurisdiction to levy an excise tax. That all except \$131.49 of said assessment represents taxes levied upon

the payment of such dividends. This proportion is presented as an alternative and is not to be construed as an admission that the law is valid insofar as it taxes dividends paid to Wisconsin residents or as an abandonment of the principal position taken that the whole law and the tax assessed thereunder is invalid.

(2) That said law is further unconstitutional under Section 1 of the Fourteenth Amendment of the Constitution of the United States of America and Article I, Section 1, of the Constitution of the State of Wisconsin, because it is a direct tax upon the Minnesota Mining and Manufacturing Company stock. The state of Wisconsin has no jurisdiction to tax said stock insofar as it is owned by persons not residing within the state.

110 All of the tax, except \$131.49 thereof, was levied with respect to dividends paid upon stock owned by non-residents of the State of Wisconsin.

(3) That said Section 3 of Chapter 305 of the Wisconsin Session Laws of 1935 and amendments thereto is unconstitutional under Section 1 of the Fourteenth Amendment to the Constitution of the United States of America and Article I, Section 1, of the Constitution of the State of Wisconsin, in that it deprives the Minnesota Mining and Manufacturing Company of liberty and property without process of law, in that it requires it to file returns, keep detailed figures and accounts, to collect the tax by making deductions from dividends paid and to perform numerous

other acts within the State of Minnesota. That the State of Wisconsin has no jurisdiction to require the Minnesota Mining and Manufacturing Company to do such acts within the State of Minnesota in order to assist it in collecting said tax levied by said section and the amendments thereto.

(4) That Section 3 of Chapter 505 of the Wisconsin Session Laws for 1935 and amendments thereto is unconstitutional under Section 1 of the Fourteenth Amendment to the Constitution of the United States of America and Article I of Section 1 of the Constitution of the State of Wisconsin, because when declared a dividend became a debt of the company. The tax is in effect a direct tax upon such debt which has no taxable situs in the State of Wisconsin.

(5) That Section 3 of Chapter 505 of the Wisconsin Session Laws for 1935 and amendments thereto is unconstitutional under Section 1 of the Fourteenth Amendment to the Constitution of the United States of America and Article I, Section 1, of the Constitution of the State of Wisconsin because it attempts to levy a tax upon dividends paid from earnings accumulated before its passage. That accumulated earning cannot be apportioned as to time and therefore the tax is unconstitutional as to 1936 dividends because it is retroactive and in effect a tax upon accumulated surplus that does not have a taxable situs in the State of Wisconsin.

(6) That Section 3 of Chapter 505 of the Wisconsin Session Laws for 1935 and amendments thereto is unconstitutional under Section 1 of the Fourteenth Amendment to the Constitution of the United States of America, and Article VI of Section 1 to the Constitution of the State of Wisconsin, because it attempts to impose an excise tax upon the payment and receipt of dividends paid out of Wisconsin earnings. Other earnings are exempt. Such exemption is a denial of equal protection of the laws and unreasonable. Such tax is also not uniform.

(7) That Section 3 of Chapter 505 of the Wisconsin Session Laws of 1935 and amendments thereto is unconstitutional under Article I, Section 10 of the Constitution of the United States of America and Article I, Section 12 of the Constitution of the State of Wisconsin, because it impairs the obligation of contract. Said law impairs the contract of the stockholders with the corporation under the general corporate charter and under the dividend resolutions by which the shareholders received a right to the dividends in question. Said law further impairs the contract of the corporation with the States of Delaware, Minnesota and Wisconsin.

(8) That Section 3 of Chapter 505 of the Wisconsin Session Laws of 1935 and amendments thereto is unconstitutional under Article IV, Section 1 of the Constitution of the United States of

America, because it fails to give full faith and credit to the laws of the States of Delaware and Minnesota, and the corporate charter, by-laws and resolutions of the Minnesota Mining and Manufacturing Company drawn pursuant thereto, which give it the right to conduct its business and declare dividends in the State of Minnesota.

112 (9) That Section 3 of Chapter 505 of the Wisconsin Session Laws of 1935 and amendments thereto is unconstitutional under Article I, Section 8 of the Constitution of the United States of America because it interferes with the power of Congress to regulate commerce among the several states. Said law interferes with the free transmission of corporate funds from state to state.

(10) That said assessment is further void because the same was calculated pursuant to the statutory presumption under Section 3 of Chapter 505 of the Wisconsin Session Laws of 1935 and amendments thereto, that the dividends in question were paid from the previous year's income and contain an exact proportionate part of the Wisconsin earnings for such year. Such presumption contained in the law in question is plainly not in accord with the true facts and has been rebutted by the proof as made, and if not so rebutted the same is void, is arbitrary and unreasonable and unconstitutional under the Fourteenth Amendment of the Constitution of the United States of America and Article I, Section 1 of the Wisconsin Constitution.

(11) That Section 3 of Chapter 505 of the Wisconsin Session Laws of 1935 and amendments thereto and the purported tax levied thereunder, is unconstitutional under Section 1 of the Fourteenth Amendment to the Constitution of the United States of America and Article I, Section 1 of the Constitution of the State of Wisconsin, in that it deprives the Minnesota Mining and Manufacturing Company and/or its stockholders of liberty and/or property without due process of law, in that it imposes upon non-resident stockholders what is in effect a tax upon incomes of such stockholders although such income is not earned within the State of Wisconsin nor derived from property or business conducted within such state.

(12) That Section 3 of Chapter 505 of the 113 Wisconsin Session Laws of 1935 and amendments thereto and the purported tax levied thereunder is unconstitutional under Article I, Section 8, paragraph 2, of the Constitution of the United States of America in that it imposes a tax upon federal instrumentalities and interest derived therefrom.

(13) That Section 3 of Chapter 505 of the Wisconsin Session Laws of 1935 and amendments thereto and the purported tax levied thereunder, is unconstitutional under Section 1 of the Fourteenth Amendment to the Constitution of the United States of America and Article I, Section 1,

of the Constitution of the State of Wisconsin, in that it is in effect imposing a tax upon interest and dividends received by the Minnesota Mining and Manufacturing Company from intangibles having no taxable situs within the State of Wisconsin.

(14) That Section 3 of Chapter 505 of the Wisconsin Session Laws of 1935 and amendments thereto and the purported tax levied thereunder, is unconstitutional under Section 1 of the Fourteenth Amendment to the Constitution of the United States of America and Article I, Section 1 of the Constitution of the State of Wisconsin, in that it is in effect imposing a tax upon incomes from royalties received by the Minnesota Mining and Manufacturing Company which incomes have no taxable situs in the State of Wisconsin.

(15) That said assessment as modified and corrected by the Wisconsin Tax Commission, insofar as it includes as part of the base upon which computation of tax is made so-called "dividends" on treasury stock owned by the company, is void in that Section 3 of Chapter 505 of the Wisconsin Session Laws of 1935 and amendments thereto does not contemplate that such so-called "dividends" be subjected to tax.

(16) That Section 3 of Chapter 505 of the Wisconsin Session Laws of 1935 and amendments thereto and the purported tax levied thereunder, is unconstitutional under Section I of the Four-

Page of
Record.

teenth Amendment to the Constitution of the United States of America in that it is using the earnings of the Minnesota Mining and Manufacturing Company earned outside of the State of Wisconsin as a base for said privilege dividend tax and this is in effect imposing a tax upon earnings of the Minnesota Mining and Manufacturing Company earned outside of the State of Wisconsin.

The appellant herein has availed itself of the remedies provided by the Statutes of the State of Wisconsin, and particularly Sections 71.12, 71.14 and 71.17.

**MINNESOTA MINING AND
MANUFACTURING COMPANY**
By H. P. Buetow
Ass't Secretary

FREDERICK J. MILLER
American National Bank Bldg.
Little Falls, Minnesota

JOHN L. CONNOLLY
791 Forest Street
St. Paul, Minnesota

ELA, CHRISTIANSON & ELA
One West Main Street
Madison, Wisconsin

115

EXHIBIT I.

Office of

WISCONSIN TAX COMMISSION*In the Matter of the Appeal of***MINNESOTA MINING AND MANUFACTURING COMPANY**

from an Assessment of Privilege Dividend Taxes
with Respect to Dividends Paid in the Year 1936

DECISION

This matter involves an assessment of privilege dividend taxes under the provisions of Section 3 of Section 71.60, Stats. 1937, with respect to dividends paid in 1936. The assessment is the result of a field audit by the Tax Commission's auditor.

The taxpayer offers evidence to the effect that the Minnesota Mining and Manufacturing Company, the appellant herein, is a corporation duly organized and existing by virtue of the laws of the state of Delaware, with its principal place of business in the city of St. Paul, state of Minnesota, and operating a factory for the manufacturing of colorquartz at Wausau, Wisconsin. The First Trust Company of St. Paul is the transfer agent for the taxpayer. All dividends were declared at a meeting of the board of directors in

St. Paul, and all dividends paid by the taxpayer during the period affected by the tax in question were paid to the transfer agent in St. Paul by a check drawn on a St. Paul bank and by it distributed to the stockholders of the taxpayer. The taxpayer had 961,260 shares of common stock distributed in practically every state in the Union; 3,006 shares of stock were owned by residents of the state of Wisconsin. There was no preferred stock outstanding.

116 The sales of the products of the taxpayer are largely made from the Chicago office of the taxpayer, and the proceeds of such sales are remitted by the purchaser directly to the St. Paul office of the taxpayer and deposited by the taxpayer in banks in St. Paul. All books and records covering the Wausau operations of the taxpayer are kept in St. Paul. All wages are paid directly from St. Paul. The receipts from the Wausau factory are commingled with the earnings from the taxpayer's factories at other places outside the state.

During the year 1930, the taxpayer acquired all of the outstanding capital stock of the Baeder-Adamson Paper Mills, Inc., Philadelphia, Penna., for a consideration of \$1,267,306.66 for 10,000 shares. A year or two later, they sold 5,000 shares for \$633,650. During the year 1931, this concern discontinued operations, and, in 1935, the buildings were sold to a wrecking company for \$1,500 and the land was sold during the same year at a sheriff's sale to satisfy creditors.

In 1933 and 1934, after the Baeder-Adamson Paper Mills, Inc., discontinued operations, taxpayer set up on its books a reserve for loss on this stock in the amount of \$390,656.66. When the property was sold in 1935, the loss charged on the books of the taxpayer was the sum of \$243,000. The state's auditor, in determining this tax, charged off \$633,656.66 as a loss in 1935, thus reducing the taxpayer's total income from \$2,155,116.96 to \$1,764,460.30 and increasing the Wisconsin percentage of its total income from 12.1180 to 14.8010.

The auditor did not charge a tax on the dividend of \$371.25 on the taxpayer's treasury stock paid on January 2, 1936. The difference between 117. the auditor's figures as to dividends paid and taxpayer's figures of dividends actually paid is accounted for by the fact that the auditor has imposed a tax on subsequent dividends of \$1,866.25 on the taxpayer's treasury stock.

On August 13, 1937, the Income Tax Division duly notified the taxpayer that it owed a privilege dividend tax of \$6,382.75, with interest amounting to \$501.01, computed to September 30, 1937; and on August 18, 1937, the taxpayer duly applied for hearing on said privilege dividend tax before the Wisconsin Tax Commission.

The taxpayer contends that its Wisconsin business is susceptible to separate accounting, and the taxpayer has filed its 1936 income tax return on a basis of separate accounting, which return has been approved by the Income Tax Division on that basis.

In 1935 and 1936, the taxpayer received income from intangible property, including royalties, dividends, and interest, some of the interest being on securities issued by the United States Government. None of the intangibles had a situs in Wisconsin, and the auditor for the Tax Commission did not include any part of the income from intangible property. The income from intangibles was included by the auditor in total income in determining the ratio of Wisconsin income to such total income.

In 1936, Minnesota Mining and Manufacturing Company held shares of its own stock in its treasury. In the balance sheets this stock was shown among the liabilities as outstanding stock and among the assets as an investment. In paying dividends, the taxpayer issued one check to its transfer agent for the total amount of the dividend and the transfer agent then issued dividend checks to the stockholders. Dividends on treasury stock were included in the check drawn to the transfer agent and the taxpayer received from such agent a check for the dividends on treasury stock. The amounts thus received in 1936 totaled \$2,237.50, of which \$371.25 was paid on January 2, 1936, and the remainder of 118 \$1,866.25 was paid subsequent to that date.

The author incorrectly applied a tax rate of 2.5641 per cent to the portion of the dividends which the auditor determined were paid out of Wisconsin income.

The first question to be determined by the Commission is whether or not the privilege dividend tax law is constitutional. The Commission has held in different cases that it has no power to pass upon the constitutionality of the privilege dividend tax law. Furthermore, the Commission is of the opinion that the constitutionality of the privilege dividend tax law was passed upon by *State ex rel. Froedtert G. & M. Co., vs. Tax Comm.*, 221 Wis. 225.

The next question is whether the privilege dividend tax may be imposed with respect to dividends paid on treasury stock. It is generally conceded that every person owning stock has the same right to share in dividends, in accordance with the rule laid down in *Hartley vs. Pioneer Iron Works*, 181 N. Y. 73; 73 N. E. 576. Eight states have deemed it necessary to provide by statute that no dividends be paid on treasury stock. The fact that these eight states have thought it necessary to enact such legislation is an argument in favor of the proposition that if there is no such statute, and Wisconsin has none, then treasury stock is entitled to participate in dividends. In the same case it is held that dividends may be declared on treasury shares, to be applied to the purchase price of the shares for the benefit of certain persons who have contracted to buy them. In the instant case, the corporation paid the dividends on its treasury stock, the money was turned over to the fiscal agent, and a dividend check was returned to the corporation.

Under the facts as shown in this case, and the rule laid down in the *Hartley* case, and in accordance with subsection (7) of the dividend tax law, 119 which provides that dividends shall be defined as they are in section 71.02 of the statutes, the Commission must hold that the treasury stock of this corporation was properly assessed.

Did the income tax auditor base the privilege dividend taxes as assessed solely upon income earned in Wisconsin? The taxpayer's brief states that the Wisconsin income was only \$245,941.39, while the auditor's report shows that the income out of the Wisconsin business amounted to \$248,927.48. But by reason of the concession relating to Baeder Adamson Paper Mills, Inc., stock, the dividends from Wisconsin income are reduced to approximately \$218,000. While this disposes of the taxpayer's argument, it should be noted that the 1935 Wisconsin income was \$261,157.62, and it must be accepted as the amount of Wisconsin income available for dividends. The figure used by the taxpayer is nowhere shown in the record but is computed by deducting the 1934 loss of \$15,216.23 from the 1935 admitted income. The fact that in a computation of normal income taxes the Legislature has allowed 1935 income to be offset by the 1934 net business loss is without effect in the computation of the earnings attributable to Wisconsin for privilege dividend tax purposes and has no effect upon the amount of 1935 income available for dividends.

Are the privilege dividend taxes, as determined by the auditor, based in part upon dividends on income from intangible property? The taxpayer contends that the tax has been imposed with respect to dividends paid out of royalties, dividends and interest received, including the interest on federal securities. This argument proceeds from the assumption that all of the income from intangible property received in 1935 was paid out in 1936 dividends. There is nothing in the record to support this argument. There is nothing to show that the proportion of intangible income paid out in dividends is any higher or any different than the proportion of other types of income thus distributed. The ratio of total 120 dividends of \$1,682,200.05 to total income of \$2,007,460.30 is roughly 85 per cent. That proportion of the total income was paid out in dividends and there is no ground for the assertion that any higher percentage of income from intangible property was distributed to the stockholders.

The interest, dividends and royalties are included in total income but are not included in Wisconsin income. They are thus treated as income from sources outside of the state, and the method of computation used by the auditor does not impose a privilege dividend tax on their distribution. The result reached by this computation is the same result which would be reached if the ratio of total dividends to the total income were to be applied to the Wisconsin income, and

this clearly demonstrates that no privilege dividend tax is imposed with respect to income from intangible property having a situs outside of the state. The taxpayer subtracts the interest, dividends and royalties from the total dividends paid and applies to the remainder a fraction which has as its denominator this total income, including that from intangibles. This method obviously gives double effect to the intangible income.

The taxpayer's argument that that portion of the loss which was charged to the reserve should not be used to reduce 1935 income, since provision for this loss had to that extent been made in prior years, and that such portion of the loss should be ignored in determining the 1935 income available for dividends, was well taken. The auditor was mistaken in using the tax rate of 2.5641 per cent in computing the privilege dividend taxes here involved. The rate which should have been used is 2.5 per cent, and the taxes should be recomputed to give effect to this change.

FINDINGS.

121 ***THE COMMISSION FINDS*** That the privilege dividend tax in the instant case was properly assessed on treasury stock.

IT FURTHER FINDS That the income tax auditor assessed the privilege dividend taxes solely upon income earned in Wisconsin.

IT FURTHER FINDS That the ratio of total dividends of \$1,682,200.05 to total income of \$2,007,460.30 is roughly 85 per cent. That proportion of the total income was paid out in dividends and there is no ground for the assertion that any higher percentage of income from intangible property was distributed to the stockholders. The interest, dividends and royalties are included in total income but are not included in Wisconsin income, and the method of computation used by the auditor does not impose a privilege dividend tax on their distribution.

IT FURTHER FINDS That that portion of the loss which was charged to the reserve should not be used to reduce the 1935 income since provision for this loss had to that extent been made in prior years, and that such portion of the loss should be ignored in determining the 1935 income available for dividends.

IT FURTHER FINDS That the Auditor was mistaken in using the tax rate of 2.5641 per cent in computing the privilege dividend taxes here involved. The rate which should have been used is 2.5 per cent.

IT FURTHER FINDS That it has no power to pass upon the constitutionality of the privilege dividend tax law.

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EXHIBIT II.

122 1/2

MINNESOTA MINING AND MANUFACTURING COMPANY.

Recomputation of Privilege Dividend Taxes, Giving Effect
to Adjustment of Tax Rate and to Recomputation of Per-
centage of Dividends Paid Out of Wisconsin Income (In-
cluding Dividends on Treasury Stock.)

	DATE PAID	1-2-36	4-1-36	7-1-36	10-1-36	12-22-36	TOTALS
Total Dividends per Original Audit Report		\$125,909.83	\$216,380.97	\$288,278.00	\$336,441.00	\$624,819.00	\$1,681,828.80
Dividend on Treasury Stock not Included in Above		371.25					371.25
Total Dividends as Adjusted		\$216,281.08	\$216,380.97	\$288,278.00	\$336,441.00	\$624,819.00	\$1,682,200.05
Per cent Paid from Wisconsin Income (Exhibit B)		13.0093	13.0093	13.0093	13.0093	13.0093	
Dividends from Wisconsin Income Rate of Tax		\$ 28,136.65 .025	\$ 28,149.65 .025	\$ 37,502.95 .025	\$ 43,768.62 .025	\$ 81,284.58 .025	\$ 218,842.45
Corrected Privilege Dividend Tax		\$ 703.42	\$ 703.74	\$ 937.57	\$ 1,094.22	\$ 2,032.11	\$ 5,471.06
Penalty and Interest to March 1, 1939		140.68	130.19	159.39	169.60	294.66	894.52
Total		\$ 844.10	\$ 833.93	\$ 1,096.96	\$ 1,263.82	\$ 2,326.77	\$ 6,365.58

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DECISION

IT IS, THEREFORE, ORDERED That the assessment herein be recomputed in accordance with our findings.

IT IS FURTHER ORDERED That the assessment as computed be placed on the tax roll, and that proper notice be given to the parties to this appeal of this decision.

Dated at the State Capitol, Madison, Wisconsin, this 19th day of December, 1938.

WISCONSIN TAX COMMISSION

W. J. Conway

Henry A. Gunderson

Herbert L. Mount

Commissioners.

Exhibit II—Folded Insert.

EXHIBIT B

MINNESOTA MINING AND MANU-
FACTURING COMPANY.

Recomputation of Percentage of Dividends Paid in 1936 Out of Income from Wisconsin Property and Business.

Total 1935 Income per Original Audit Report	\$1,764,460.30
Adjustment for Loss on Baeder Adamson Paper Mills Company Stock Charged to Reserve, per Tax Commission Decision	243,000.00
<hr/>	<hr/>
Total 1935 Income as Adjusted	\$2,007,460.30
<hr/>	<hr/>
Wisconsin Income for 1935	261,157.62
<hr/>	<hr/>
Ratio of Wisconsin Income to Total Income	13.0093%
<hr/>	<hr/>

126-127 ANSWER OF TAX COMMISSION ON APPEAL TO CIRCUIT COURT.

(Omitting title.)

126. For answer to the objections raised by the Appellant in the above-entitled action, the above-named Respondent, appearing by the Attorney General and Harold H. Persons, Assistant Attorney General, say that the assignments of error are without support in the law, or in the facts as shown by the record made up of copies of all the

documents, papers, evidence, statements and exhibits on file in the matter and all the testimony taken down, returned into court pursuant to Sec. 71.16, Wis. Stats.

JOHN E. MARTIN,
Attorney General,

HAROLD H. PERSONS,
Assistant Attorney General,
Attorneys for Respondent.

2 Return of Tax Commission on Appeal to Clerk of Circuit Court, Dane County (omitted).
3 Index of Transcript of Testimony Before Tax Commission (omitted).

7-43 PROCEEDINGS BEFORE TAX COMMISSION.

7 Title Page (omitted).
8 Index of Testimony Before Tax Commission (omitted).
9 **PRESENT:** Before Commissioners Wm. J. Conway, Herbert L. Mount, and Henry A. Gunderson. **Appearances:** For the Income Tax Division of the Tax Commission: John S. Best, Esq., Income Tax Counsel. For the Taxpayer: Frederick J. Miller, Esq., of Little Falls, Minnesota, and John L. Connolly, Esq., of St. Paul, Minnesota.

ABSTRACT OF PROCEEDINGS AND
TESTIMONY.

10 Mr. Best: If the Commission please, this is an appeal from an assessment of privilege dividend taxes with respect to dividends paid by the Minnesota Mining and Manufacturing Company in the year 1936.

We offer in evidence the stipulation of facts agreed to between the parties and request that the reporter mark it Exhibit 1.

Stipulation of facts marked Exhibit 1, AJK.

Mr. Miller: No objection as far as we are concerned.

Document marked Exhibit 2, AJK.

Mr. Best: The reporter has marked as Exhibit 2 copy of letter from Wisconsin Tax Commission to Minnesota Mining and Manufacturing Company dated August 13th, 1937, being the notice of the assessment here involved, attached to which is a return receipt for registered mail. We offer Exhibit 2 in evidence.

Mr. Miller: No objection.

Commissioner Conway: Received.

Document marked Exhibit 3, AJK.

Mr. Best: The reporter has marked as Exhibit 3 the Tax Commission's audit report of privilege dividend tax payments by the Tax Commission's auditor, Mr. Stillman Kuhns, dated July 3rd, 1927. We offer Exhibit 3 in evidence.

Mr. Miller: No objection.

Commissioner Conway: Received.

Document marked Exhibit 4, AJK.

Mr. Best: The reporter has marked as Exhibit 4 a letter from Minnesota Mining and Manufacturing Company to Wisconsin Tax Commission dated August 18th, 1937, being the taxpayer's original protest and request for hearing in this matter, which we offer in evidence.

11. Mr. Miller: No objection.

Commissioner Conway: Received.

Document marked Exhibit 5, AJK.

Mr. Best: The reporter has marked as Exhibit 5 copy of letter from Wisconsin Tax Commission to Minnesota Mining and Manufacturing Company, dated August 19th, 1937 acknowledging receipt of the taxpayer's protest. We offer Exhibit 5 in evidence.

Mr. Miller: No objection.

Commissioner Conway: Received.

Document marked Exhibit 6, AJK.

Mr. Best: The reporter has marked as Exhibit 6 a letter from Minnesota Mining and Manufacturing Company to Wisconsin Tax Commission dated March 17th, 1938, attached to which is an amendment to the taxpayer's protest made August 8th, 1937.

Mr. Miller: No objection.

Mr. Best: This Exhibit should be part of the record to complete the picture here. It contains some statements of fact which we feel are immaterial and we request that it be made a part of the record as showing the issues raised by the taxpayers herein without conceding the correctness or materiality of it in Exhibit 6.

Page of
Record.

Mr. Miller: There are one or two errors which we would like to correct by testimony.

Mr. Best: No objection to that manner of treating it.

Commissioner Conway: You are offering Exhibit 61

12 Mr. Best: Yes, with the conditions I stated.

Commissioner Conway: With that understanding there is no objection.

Mr. Miller: There are a couple of errors we would like to correct by the testimony of Mr. Buetow.

Commissioner Conway: You may proceed.

60-63 EXHIBIT 1—Stipulation of Facts.

(Title omitted.)

STIPULATION OF FACTS

60 It is hereby stipulated by and between John S. Best, Income Tax Counsel of Wisconsin Tax Commission, for and on behalf of the State of Wisconsin, and John L. Connolly and Frederick J. Miller, attorneys for and on behalf of the Minnesota Mining and Manufacturing Company, a corporation, that in determination of the above protest by the Commission the following facts are admitted:

L

That the Minnesota Mining and Manufacturing Company, hereinafter referred to as the

“taxpayer,” is a corporation duly organized and existing by virtue of the laws of the State of Delaware, with its principal place of business in the City of St. Paul, State of Minnesota, operating a factory manufacturing colorquartz at Wausau, Wisconsin; the First Trust Company of St. Paul is the transfer agent for the taxpayer; all dividends were declared at meetings of the Board of Directors in St. Paul, no dividends were declared in Wisconsin, all dividends paid by the taxpayer during the period affected by the tax in question were paid to the transfer agent in St. Paul by a check drawn on a St. Paul bank and by it distributed to the stockholders of the taxpayer.

61

II.

During the year 1930, the taxpayer acquired all of the outstanding capital stock (except qualifying shares) of the Baeder Adamson Paper Mills, Inc., Philadelphia, Penn., for a consideration of \$1,267,306.66 or \$126.73 per share for 10,000 shares.

Cost of Stock	\$1,267,306.66
Less Cost of 5,000	
Shares Sold 1931-33	633,650.00

Cost of 5,000 Shares	
Unsold	\$ 633,656.66

During the year 1931, the Baeder Adamson Paper Mills, Inc., discontinued operations. In 1935 the buildings were sold to a wrecking company for \$1,500.00 and the land was sold during the same year at a sheriff's sale to satisfy creditors.

After the Baeder Adamson Paper Mills, Inc., discontinued operation, taxpayer set up on its books a reserve for loss on this stock in the amount of \$390,656.66. On December 31, 1935, part of the actual loss of \$633,656.66 was charged to this reserve. The Commission, in arriving at the total taxable income for the year 1935, charged 62 off as a loss the sum of \$633,656.66, being the figure at which the Baeder Adamson Paper Mills, Inc., stock was carried on the books of taxpayer immediately prior to December 31, 1935, and being the amount charged off by the taxpayer on that date, less \$390,656.66 reserve hereinbefore mentioned.

III.

That the total book income of the taxpayer for the year 1935 was \$2,250,775.45 and that the total income appearing on Schedule 2 of the Audit of Privilege Dividend Tax Payments by Wisconsin Tax Commission, dated July 3, 1937, was determined as follows:

Book Income	\$2,250,775.45
Loss on Baeder Adamson Pa- per Mills, Inc., Stock	633,656.66
Life Insurance Premiums	4,195.85
Federal Income Taxes Re- served	350,000.00
Federal Income Taxes Paid	<u>206,854.34</u>
Total Income Per Audit Re- port	\$1,764,460.30

IV.

That on August 13, 1937, the Wisconsin Tax Commission duly notified the taxpayer that it owed a privilege dividend tax of \$6,382.75, with interest amounting to \$501.01, computed to September 30, 1937; and on August 18, 1937, the taxpayer duly applied for hearing on said privilege dividend tax before the Wisconsin Tax Commission.

V.

That the taxpayer's business in Wisconsin is susceptible to separate accounting, and the taxpayer has filed its 1936 income tax return on a basis of separate accounting, which return has 63 been approved by the Wisconsin Tax Commission on that basis.

* * * * *

The taxpayer and the State of Wisconsin shall have the right at the hearing before the Wisconsin Tax Commission to introduce additional evidence with respect to the issues involved in this appeal.

Dated this 14th day of April, 1938.

JOHN A. BEST,

Income Tax Counsel,

FREDERICK J. MILLER,

JOHN L. CONNOLLY,

Attorneys for Minnesota
Mining and Manufactur-
ing Company.

Page of
Record.

65- **EXHIBIT 2—Return Receipt of Registered Letter and Letter of Wisconsin Tax Commission to Minnesota Mining and Manufacturing Company, Dated August 13, 1937, Assessing Privilege Dividend Tax.**

(Return receipt omitted.)

66

August 13, 1937.

Minnesota Mining & Manufacturing Company,
791 Forest Street,
St. Paul, Minnesota.

In Re: 99-17923

Gentlemen:

We are enclosing a copy of the report of our auditor, Mr. Stillman Kuhns, covering verification of your privilege dividend tax payments for 1935 and 1936.

The total additional privilege dividend tax shown on Schedule 1 of the enclosed report plus penalty and interest to September 30, 1937, is \$6,883.76, and we are enclosing a bill for this amount.

You are hereby notified of the above additional assessment pursuant to Sections 71.10, 71.11, 71.115 and 71.12 of the Statutes.

If you desire a hearing in this matter, it will be necessary for you to apply therefor in writing stating definitely and in detail your objections to the assessment. Such application must be filed in duplicate within twenty days from the receipt of this notice.

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Record.

If a hearing is applied for, you may, under Section 71.10 (6) (a), elect to deposit with the State Treasurer the total amount of the additional taxes set forth above together with interest thereon to the first day of the month succeeding the application for hearing. Your election to so deposit these taxes must be expressed in your application for hearing.

If no request for hearing is made within the time specified above, this assessment will become final and conclusive.

Yours very truly,

WISCONSIN TAX COMMISSION

Income Tax Division

By:

Joel S. Hendrickson

Chief Auditor

JSH:W

Enc.

Registered Mail

Return Receipt Requested

70

Minneapolis, Minnesota,

July 3, 1937.

Wisconsin Tax Commission
State Capitol,
Madison, Wisconsin.

Dear Sirs:

Attached are exhibits showing the computation of additional privilege dividend tax due from the Minnesota Mining and Manufacturing Company.

Page of
Record.

The additional tax represents the total privilege dividend tax liability incurred during the years 1935 and 1936 inasmuch as no privilege dividend tax has previously been paid.

Respectfully submitted,

Stillman Kuhns,
Field Auditor.

Exhibit 3—Folded Insert.

75- **EXHIBIT 4**—Letter of Minnesota Mining and
76 Manufacturing Company to Wisconsin
Tax Commission, Protesting Privilege
Dividend Tax and Demanding Hearing
(omitted).

77- **EXHIBIT 5**—Letter of Wisconsin Tax Com-
78 mission to Minnesota Mining and Man-
ufacturing Company, Acknowledging
Receipt of Protest and Demand for
Hearing (omitted).

80- **EXHIBIT 6** — Letter of Transmittal and
91 Amended Protest.

(Omitting letter of transmittal and title
of amended protest and verification.)

80 AMENDMENT TO PROTEST MADE
AUGUST 18, 1937.

The Minnesota Mining and Manufacturing Company, a Delaware corporation, duly authorized to transact business as a foreign corporation in Wisconsin, hereby files objections to an addi-

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EXHIBIT 3, Audit of Privilege Dividend Tax Enclosed in Letter of August 13, 1937.

(Title page and table of contents omitted.)

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SCHEDULE 1.

MINNESOTA MINING AND MANUFACTURING COMPANY.

Computation of Additional Privilege Dividend Tax—1936.

<i>Dividends Paid</i>	<i>1/2/36</i>	<i>4/1/36</i>	<i>7/1/36</i>	<i>10/1/36</i>	<i>12/22/36</i>	<i>Total</i>
Total Dividend	\$215,909.83	\$216,380.97	\$288,278.00	\$336,441.00	\$624,819.00	\$1,681,828.80
Per Cent Taxable (Schedule 2)	14.8010	14.8010	14.8010	14.8010	14.8010	14.8010
Taxable Dividend	\$ 31,956.81	\$ 32,026.55	\$ 42,668.03	\$ 49,796.63	\$ 92,479.46	\$ 248,927.48
Rate of Tax	2.5641	2.5641	2.5641	2.5641	2.5641	2.5641
Amount of Tax	\$ 819.40	\$ 821.19	\$ 1,094.05	\$ 1,276.84	\$ 2,371.27	\$ 6,382.75
Penalties and Interest						
Total Privilege Dividend Tax and Interest						

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SCHEDULE 2.

MINNESOTA MINING AND MANUFACTURING COMPANY.

Computation of Per Cent of Divident Declared and Paid
Out of Income Derived from Property Located and Business
Transacted in Wisconsin.

1935—Total Income	\$1,764,460.30
1935—Wisconsin Income	261,157.62
Percentage of Wisconsin to Total	14.8010

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SCHEDULE 3.

72

SCHEDULE 2.

MINNESOTA MINING AND MANUFACTURING COMPANY.

Computation of Per Cent of Divident Declared and Paid
Out of Income Derived from Property Located and Business
Transacted in Wisconsin.

1935—Total Income	\$1,764,460.30
1935—Wisconsin Income	261,157.62
Percentage of Wisconsin to Total	<u>14.8010</u>

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SCHEDULE 3.

MINNESOTA MINING AND MANUFACTURING COMPANY.

Summary of Dividends Declared and Paid—
September 26, 1933 to December 31, 1936.

Type of Stock	Date Declared	Date Paid	Amount
Common	12-16-35	1-2-36	\$ 215,909.83
Common	3-10-36	4-1-36	216,380.97
Common	6-17-36	7-1-36	288,278.00
Common	9-22-36	10-1-36	336,441.00
Common	12-7-36	12-22-36	624,819.00
Total Dividends Declared			\$1,681,828.80

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tional assessment of privilege dividend taxes in the principal amount of \$6,382.75, with interest amounting to \$501.01, in respect of dividends assessed against the company between the 16th day of December, 1935, and the 22nd day of December, 1936, both inclusive, by notice dated August 13, 1937, and pursuant to audit report dated August 13, 1937. In accordance with the statutes of the state of Wisconsin, and particularly Chapter 233 of the Laws of 1937, and Wisconsin Statutes, Section 71.12, the company hereby applies for a hearing.

The period prescribed by law within which this application may be filed has been duly extended by the Tax Commission to September 2, 1937.

The objections to said assessment and the facts in support of such objections are as follows:

81 1. The Minnesota Mining and Manufacturing Company is a Delaware corporation which conducts, and at the times hereinafter mentioned, did conduct a manufacturing business in the states of Minnesota, Wisconsin, Michigan and Ohio, and sells its products in several states in the Union and in foreign countries. The company owns a substantial amount of stock in corporations, has earnings accruing to it from royalties, and interest from federal securities. That the principal office of the company is in Wilmington, Delaware. Meetings of all the stockholders are held in St. Paul, Minnesota. That the principal business office at which all the meetings of the directors are held is in St. Paul, Minnesota.

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2. On each of the dates fixed as a record date for the determination of the stockholders entitled to receive each of the dividends upon which a privilege dividend tax was assessed against the company there have been in excess of 2,300 stockholders of the company residing in all parts of the United States holding an aggregate of 961,260 ~~shares~~ of common stock. On each of said dates the number of such stockholders residing in the state of Wisconsin has not been greater than 40, and the number of shares of stock held by such stockholders has not been greater than 5,315. The number of shares of stock held by and the amount of dividends paid to all stockholders, including the stockholders resident in Wisconsin, on each of said dates is shown in Table A attached hereto and made a part hereof.

3. All meetings of the board of directors of the company at which dividends are declared are held in the state of Minnesota, and all acts of the company or its agents in connection with the declaration and payment of such dividends are performed within and pursuant to the laws of the states of Minnesota and Delaware; and the funds out of which said dividends are paid are kept in the state of Minnesota. No act or transaction in connection with the declaration and payment of such dividends is done within the State of Wisconsin, with the sole exception that certain dividends so declared and paid, amounting in case of each of the dividends mentioned in Table A to less than . . . of 1% of all the dividends de-

clared and paid, are received by stockholders residing in the state of Wisconsin. The percentage, received by residents of Wisconsin, of the total of each of said dividends is set forth in Table A.

4. The process by which income earned in Wisconsin finally reaches stockholders of the Company is as follows:

The company has a factory at Wausau, Wisconsin, where it manufactures colorquartz and ships all the products of said factory to Chicago or points east. The sales of said product are made from the Chicago office of the company and the proceeds of such sales are remitted by the purchaser directly to the St. Paul office of the company and deposited by the company in banks in St. Paul. All books and records covering the company's Wausau operations are kept in St. Paul. All wages of the company's employees at Wausau are paid directly from St. Paul. The receipts from the Wausau factory of the company are commingled with the earnings from the company's factory in St. Paul, Minnesota, Detroit, Michigan, Copley, Ohio, and with earnings from companies in which the company owns a substantial amount of stock, earnings from doing business in foreign countries, earnings from royalties, dividends from stock owned by the company, interest from bonds owned by the company; and after the payment of salaries, overhead and taxes, dividends are declared and paid from this fund.

That the dividend payment is made by drawing a check or checks for the total amount to the order of the First Trust Company of St. Paul, which, itself, makes the actual payments to the stockholders.

5. That during the year 1935 the company received \$10,191.37 and during the year 1936, \$14,331.65, as earnings from the interest on federal securities, which earnings are included in the computation of earnings of the company as a basis for computing the privilege dividend tax assessed against the company.

6. During the year 1930, the taxpayer acquired all of the outstanding capital stock (except qualifying shares) of the Baeder Adamson Paper Mills, Inc., Philadelphia, Pennsylvania, for a consideration of \$1,267,306.66 or \$126.73 per share for 10,000 shares.

The net operating loss sustained by the subsidiary amounted to \$30,673.06, which, for income purposes, was reported in a consolidated return and was charged off prior to 1935.

Cost of stock	\$1,267,306.66
Net loss of subsidiary (loss previously charged off)	30,673.06
Reduced basis of 10,000 shares	1,236,633.60
Less reduced cost of 5,000 shares sold 1931-33	618,316.80
Reduced cost of 5,000 shares unsold	618,316.80

During the year 1931, the Baeder Adamson Paper Mills, Inc. discontinued operations. In 1935 the buildings were sold to a wrecking company for \$1,500.00 and the land was sold during the same year at a sheriff's sale to satisfy creditors.

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After the Baeder Adamson Paper Mills, Inc. discontinued operation, taxpayer set up on its books a reserve for loss on this stock in the amount of \$390,656.66. When the property was sold in 1935, part of the actual loss of \$618,316.80 was charged to this reserve. The Commission, in arriving at the total taxable income for the year 1935, erroneously charged off as a loss the entire amount of \$633,656.66. This loss had been definitely sustained prior to 1935, although not sustained for income tax purposes. The directors and officers of the company, in attempting to estimate it, set up a reserve of \$390,656.66. The setting up of this reserve has a definite bearing upon the dividend paid in years prior to 1935. The Commission should not deduct this entire amount during the year 1935 and in no event should deduct more than the difference between the actual loss and the reserve set up, which is \$227,760.14.

7. The taxpayer does not maintain a separate system of accounts for its operations at Wausau. The following is a statement of assets and liabilities in use in Wausau at the end of the years 1934, 1935 and 1936:

ASSETS	Dec. 31, 1934	Dec. 31, 1935	Dec. 31, 1936
Cash	4,830.42	8,645.82	6,769.06
Real Estate	12,364.00	12,664.00	14,148.55
Buildings	189,420.87	361,149.46	370,084.52
Machinery	337,790.69	351,575.96	356,828.82
Colorquartz Machinery	179,259.66	256,736.74	257,004.25
Inventory	93,675.84	194,862.45	234,524.97
	817,341.48	1,185,634.43	1,303,272.17

LIABILITIES

Reserve for Depreciation—			
Buildings	6,535.60	17,547.02	32,171.71
Reserve for Depreciation—			
Machinery	34,353.48	67,821.40	103,184.42
Reserve for Depreciation—			
Colorquartz	15,658.41	37,658.65	63,225.34
Net Earnings	7,999.84	266,494.25	449,042.97
Accrued State Income Tax		2,663.21	3,635.80
Net Advances by St. Paul	752,794.15	793,449.90	652,011.93
	817,341.48	1,185,634.43	1,303,272.17

8. That the investment income of the taxpayer for the years 1935 and 1936 is as follows:

	1935	1936
Dividend	\$328,096.23	\$254,834.00
Interest	27,125.17	7,797.53
Interest on U. S.		
Obligations	10,191.37	14,331.65
Interest on State		
Obligations	173.25	920.68
	\$365,586.02	\$277,883.86

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9. By reason of the facts above stated the transactions upon which the privilege dividend tax is attempted to be imposed in respect of Minnesota Mining and Manufacturing Company are wholly outside the jurisdiction of the state of Wisconsin, with the exception of the transfer of the dividends by the company to certain of its stockholders residing in Wisconsin, in which case the transaction takes place partly within and partly outside the jurisdiction of said state. To the extent that the privilege dividend tax is attempted to be imposed upon transactions wholly outside of the jurisdiction of the state, it is unconstitutional and void and in violation of the rights of the Minnesota Mining and Manufacturing Company and of its stockholders residing outside of the state, under the Constitution of the United States, in that it deprives them of liberty and/or property without due process of law.

86 10. Without prejudice to the statements in paragraph nine hereof, the aforesaid dividend tax law is unconstitutional and void and in violation of the rights of the Minnesota Mining and Manufacturing Company and of its stockholders who reside outside of the state of Wisconsin under the Constitution of the United States in that it deprives them of their liberty and/or property without due process of law, because it imposes upon such non-resident stockholders what is in effect a tax upon the income of such stockholders although such income is not earned within the

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state of Wisconsin nor derived from property or business conducted within such state, and in that it imposes upon the Minnesota Mining and Manufacturing Company a duty of paying and withholding from said stockholders an unconstitutional tax which requires the expenditure of time and money on the part of the company to compute, pay and withhold the tax. Although the privilege dividend tax makes the stockholders ultimately liable for the tax the company, nevertheless, has legal standing to object to the validity of the law for the reason that if the aforesaid privilege dividend tax law is unconstitutional the company is being subjected to an unconstitutional burden, and further because in practice it is impossible to withhold the exact amount of the tax from each stockholder, and it therefore becomes necessary for the company to pay a part of the tax out of its general funds.

87 11. Without prejudice to the statements in paragraphs nine and ten hereof, the aforesaid privilege dividend tax law is unconstitutional and void and in violation of the rights of the Minnesota Mining and Manufacturing Company and of its stockholders under the Constitution of the United States, in that it deprives them of property without due process of law by imposing a tax upon the privilege of receiving and paying out dividends, which privilege is not granted by and could not constitutionally be denied by the state of Wisconsin, such privilege being granted by the state of Delaware and exercised pursuant to the laws of said state.

12. Without prejudice to the statements in paragraphs nine, ten and eleven hereof, the privilege dividend tax is unconstitutional and void insofar as it imposes a tax upon dividends which are paid by the company to stockholders residing outside of Wisconsin, because it is in effect a tax upon stock held by such stockholders or upon the dividend which is a debt of the company when declared, which are outside of the jurisdiction of the state, and such tax, therefore, deprives the Minnesota Mining and Manufacturing Company and its stockholders, residing outside the State of Wisconsin, of liberty and/or property without due process of law in violation of the provisions of the Constitution of the United States.

13. Without prejudice to the statements in paragraphs nine, ten, eleven and twelve hereof, the aforesaid privilege dividend tax law is wholly void for the reason that it is unconstitutional as applied to dividends paid to stockholders residing outside of Wisconsin and to restrict the application of the law to dividends paid by Wisconsin corporations or dividends paid by foreign corporations to stockholders residing in Wisconsin would be a denial of equal protection of the law to such corporations and such stockholders and a violation of the Constitution of the United States and the Constitution of Wisconsin. Further, to so restrict the application of the law, would be to impose a tax which the legislature of Wisconsin did not intend to impose, since, notwithstanding the provisions of Laws of 1935,

Chapter 505, Section 4, it is clear that the provisions of the act are based upon a plan to impose a tax which will fall equally upon resident and non-resident stockholders of corporations doing business in Wisconsin and that to so restrict the act would be to defeat the obvious intention of the legislature.

14. Without prejudice to the statements in paragraphs nine, ten, eleven, twelve and thirteen, the aforesaid privilege dividend tax law is unconstitutional and void under Article I, Section 10 of the Constitution of the United States and Article I, Section 12 of the Wisconsin Constitution because it impairs the obligation of the contract between the stockholders and the company under the corporate charter and dividend resolutions by which the stockholders received a right to dividends.

15. Without prejudice to the statements in paragraphs nine, ten, eleven, twelve, thirteen and fourteen hereof, the aforesaid privilege dividend tax law is unconstitutional and void and in violation of the rights of the Minnesota Mining and Manufacturing Company and of its stockholders who reside outside of the state of Wisconsin in that it deprives them of their liberty and/or property without due process of law because it imposes upon such stockholders in effect a tax on income which was earned by the Minnesota Mining and Manufacturing Company without the state of Wisconsin.

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16. Without prejudice to the statements in paragraphs nine, ten, eleven, twelve, thirteen, fourteen and fifteen hereof, the aforesaid privilege dividend tax law is unconstitutional and void and in violation of the rights of the Minnesota Mining and Manufacturing Company and of its stockholders because it imposes in effect a state tax upon federal instrumentalities and the interest derived therefrom in violation of Article I, Section 8, par. 2, of the Constitution of the United States.

17. The company has not withheld from dividends paid to its stockholders any part of the dividend tax as required by Laws of 1935, Chapter 505, Section 3, subdivisions (1) and (3). In so failing to deduct such taxes the company did not intend to admit that it was liable therefor, or to assume any existing liability of its stockholders to pay the tax, but it failed to withhold the tax because it believed that said law was unconstitutional and void and that if the tax was collected from stockholders the company would be put to trouble and expense to refund to them amounts so withheld from them, and further that the company would be violating the constitutional rights of its stockholders if it acted as agent of the state to collect a tax levied under an unconstitutional law and that it would be violating the contract rights of its stockholders if it did not pay them the full amount of the dividend declared by its Board of Directors, deducting therefrom

only the amounts of valid taxes which the company would be constitutionally required to deduct and withhold.

90 18. The company claims that the computation by the Tax Commission of the privilege dividend tax alleged to be due is erroneous even assuming that the aforesaid privilege dividend tax law is entirely valid and constitutional because of the following facts:

(a) That the net income of the company for the years 1934, 1935 and 1936, respectively, which was used by the Commission in assigning the dividends to Wisconsin was \$1,203,820.30 for 1934, \$1,764,460.31 for 1935, and \$3,064,903.00 for 1936. That the dividends paid by the company in 1935, 1936 and 1937, if they were paid at all, were paid out of net income for the previous calendar or fiscal year, and not paid out of the adjusted net income computed by the Tax Commission. The net income out of which the dividends are paid is the entire net income as shown by the books of the company and is not the adjusted net income which may be used for federal or state income tax purposes. In determining whether a dividend may lawfully be paid, reference is made solely to the net income and surplus or undivided profits on the books of the company and not the taxable net income as stated in any federal or state income tax return. The adjustments which have been made in book income were made by the company to reconcile its statement of federal taxable in-

come with the changes in its surplus as shown by its books. These adjustments were made because of provisions in the federal income tax law allowing or disallowing certain types of deductions for tax purposes. The company knows no reason why such adjustments should be made in determining the income out of which dividends are paid.

(b) The rate of tax prescribed by the privilege dividend tax law is 2.5%. The tax has been assessed upon the company at the rate of 2.5641%.

91 The reason for the increase in rate is stated to be that inasmuch as the tax is not deducted from the dividends paid to stockholders, the amount of the tax in itself constitutes a further dividend which is also subject to tax and that the tax rate was therefore adjusted to the rate of 2.5641%. The company claims, however, that to apply this adjusted rate is in effect to levy a tax upon the entire tax instead of upon that part of the tax which is derived from income from sources within the state of Wisconsin, and that the correct rate will take into account the additional factor of the ratio which the Wisconsin net income bears to the total net income of the company.

(c) That the Tax Commission has erroneously deducted \$633,656.66 as a loss sustained by the company in the year 1935, and as a result is attributing to Wisconsin income from sources without the state of Wisconsin in computing this tax.

(d) That the Tax Commission has failed to deduct the interest the company received from

federal securities in determining the privilege dividend tax, and as a result is subjecting interest from federal securities to this tax.

WHEREFORE, the Minnesota Mining and Manufacturing Company demands that said privilege dividend tax of \$6,382.75 with interest amounting to \$501.01 be cancelled.

**MINNESOTA MINING AND
MANUFACTURING COMPANY**

By H. P. Buetow
Its Assistant Treasurer.

93 **EXHIBIT 7—Asset and Liability Statement.**

ASSETS	Dec. 31, 1934	Dec. 31, 1935	Dec. 31, 1936
Cash	4,830.42	8,645.82	6,769.06
Real Estate	12,364.00	12,664.00	14,148.55
Buildings	189,420.87	361,149.46	370,084.52
Machinery	333,790.69	351,575.96	356,828.82
Colorquartz Machinery	179,259.66	256,736.74	257,004.25
Inventory	93,742.75	194,868.45	266,509.27
Total Assets	813,408.39	1,185,640.43	1,271,344.47
LIABILITIES			
Reserve for Depreciation—			
Buildings	6,437.48	17,448.90	32,073.59
Reserve for Depreciation—			
Machinery	25,714.09	59,182.01	94,545.03
Reserve for Depreciation—			
Colorquartz	14,863.36	36,868.60	62,435.29
Net Earnings	7,999.84	266,494.25	449,042.97
Accrued State Income Tax		2,663.21	3,635.80
Net Advances by St. Paul	758,393.62	802,983.46	629,611.79
Total Liabilities	813,408.39	1,185,640.43	1,271,344.47

12 HERBERT B. BUETOW, called on behalf of the Minnesota Mining and Manufacturing Company, testified as follows:

By Mr. Miller:

I live in St. Paul, Minnesota. I am assistant secretary-treasurer and comptroller of the Minnesota Mining and Manufacturing Company. I have been with them since 1926.

13 Since leaving school I have been employed as a cost accountant of the Waldorf Paper Products. In 1916 I was with the St. Paul Athletic Club, where I instituted and supervised a system of accounting. I was later associated with Bishop Brissman Company, St. Paul, public accountants, as a staff auditor. Later I was employed by the City of St. Paul to institute an accounting system in the Department of Public Works. Later I became a staff auditor for a firm of public accountants by the name of McGregor and Hines. Later I had charge of the accounting of the Elks Club. I was employed by the State of Minnesota in the Department of Agriculture to make audits of various creameries for the Department of Agriculture.

I resigned to become associated with the Minnesota Mining and Manufacturing Company, first, as an auditor and later, promoted to various positions. For a period of 20 years I have done tax work, mostly federal and some state work.

My duties at the present time, as an officer of the Minnesota Mining and Manufacturing Com-

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pany, place me in direct control over the entire accounting cost and statistical department and financial records and in direct supervision of the entire office force of about 225 people. All the books and records of the company are kept under my supervision.

14 I am a member of the Comptrollers Institute of America, and at the present time I am president of the Twin Cities Chapter. This institute permits membership of comptrollers of companies whose assets exceed a million dollars throughout the United States.

I have compiled a statement of the number of stockholders and the number of outstanding shares of stock of the Minnesota Mining and Manufacturing Company, and the number of stockholders it has in Wisconsin, and the number of shares that they own. On January 1, 1936, the total was 1961 stockholders, owning 961,260 shares. There were 42 stockholders in Wisconsin, owning 3,006 shares. Since January 1, 1936, 347 stockholders, owning 138,747 shares of stock, have transferred their stock. Of this number 20 of said stockholders resided in Wisconsin and they owned 1,377 shares of stock. On January 1, 1938 there were 44 Wisconsin stockholders, owning 4,944 shares of stock.

The Minnesota Mining and Manufacturing Company operates a factory at Wausau, Wisconsin, manufacturing roofing granule. This factory ships its products to Chicago and points west. The sales from the Wausau plant are handled through a Mr. Voss, who has an office in Chicago.

He contacts various roofing companies and gets orders for roofing granules, sends the orders to

16 St. Paul, and shipping instructions are sent from roofing companies to St. Paul where decision is made as to when the shipment shall be made. When shipments are made, the Wausau plant prepares a shipping ticket, upon which is shown the tonnage shipped. This ticket is sent to St. Paul where it is priced and the bill sent from St. Paul to the consumer. The consumer remits directly to St. Paul, and these funds are commingled with funds from other factories and other divisions of our business, and are deposited in St. Paul banks. These funds are used to pay all bills, royalties and dividends. The employees of the Minnesota Mining and Manufacturing Company are paid on time cards prepared at the Wausau plant and sent to St. Paul, where extensions are made and checks are drawn on a Wausau bank, signed by an officer at St. Paul, and sent to the Wausau plant manager for distribution. A deposit in equal amount to the total of the payroll is sent the same day to the Wausau bank. The Minnesota Mining and Manufacturing Company operates factories at Detroit, Michigan; Copley, Ohio; and St. Paul, Minnesota.

17 Testimony as to Baeder-Adamson loss
(omitted).

18 The Minnesota Mining and Manufacturing Company, in 1935, received \$10,191.37 interest from federal securities and in 1936, \$14,331.65. These federal securities were actually kept in the

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19 vault in the bank in St. Paul, coupons were clipped at the bank in St. Paul and deposited in the St. Paul bank for collection. No part of the interest was ever received, paid or deposited in the State of Wisconsin.

20 The Minnesota Mining and Manufacturing Company, in 1935, received dividends of \$328,096.23 and interest from other than federal securities of \$27,125.17 and interest on state obligations of \$173.25.

In 1936, the Minnesota Mining and Manufacturing Company received dividends of \$254,834 and interest from obligations other than United States obligations of \$7,797.53.

21 22 Mr. Best: I will stipulate that there is no contention on the part of the Income Tax Division and on the part of the State that any securities or any intangibles of this taxpayer have a situs in the State of Wisconsin. That, of course, is evident from the fact that no income from such intangibles has been included in Wisconsin income by the auditor.

Discussion (omitted).

By Mr. Miller:

23 The Minnesota Mining and Manufacturing Company, in 1935, received royalties from patents owned by it of \$154,447.53, of which \$224.20 were earnings in Wausau, Wisconsin, leaving a balance of \$154,223.33 earned by the taxpayer and received by the taxpayer outside the State of Wisconsin.

24 In 1936 the income from royalties on patents owned by the Minnesota Mining and Manufacturing Company was \$153,623.35, of which \$144.76 was royalties used in the colorquartz operations at Wausau, Wisconsin, leaving a balance of \$153,478.59 which was earned from royalties outside of the State of Wisconsin.

Mr. Best: Without prejudice as to our position, as to materiality, we stipulate that these intangibles from which the royalties were derived had no business situs in Wisconsin.

Mr. Best: If the Commission please, Exhibit 3, the audit report, shows in schedule 3 a summary of the amounts of dividends paid in the year 1936, the amounts are shown with respect to the dividends paid on April, July, and October 1st, 1936, and on December 22nd, 1936, include dividends paid on treasury stock to the amount of \$1,866.25.

Mr. Miller: Correct.

Mr. Best: That is the total for those four dividends. The dividends shown in schedule 3 of Exhibit 3 as being paid on January 2, 1936 do not include an amount of \$371.25 representing a dividend on treasury stock which was paid on that day.

25 Mr. Miller: That is correct. It is our contention we shouldn't be taxed on these treasury stock dividends.

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By Mr. Miller:

When dividends are declared by the directors, a check is drawn on the First National Bank of St. Paul for the full amount of the dividend, including treasury stock, payable to the First Trust Company of St. Paul. It actually pays the dividends to the stockholders and returns to the Minnesota Mining and Manufacturing Company the dividend allotted to the number of shares held by the company. None of the money which is turned over to the transfer agent at the time

26 the dividends are paid is drawn on any Wisconsin bank. The directors hold no meetings in the State of Wisconsin and no dividends are declared in the State of Wisconsin by the Minnesota Mining and Manufacturing Company.

The Minnesota Mining and Manufacturing Company commenced its Wausau plant operations in December, 1929. The first year they operated was 1930. They have operated ever since. I have prepared a statement of assets and liabilities for the years ending December 31, 1934, 1935 and 1936. It is Exhibit 7.

27 We do not maintain a separate set of books for our Wisconsin business. Exhibit 7 was prepared from our general ledger, depreciation book and inventories.

Mr. Miller: May we stipulate that the income of the taxpayer for the year 1930 in the State of Wisconsin was \$2,396.37?

28 Mr. Best: I will stipulate that is the correct 1930 income attributable to the activities in the State of Wisconsin.

29 Discussion.

By Mr. Miller:

30 The total income of the Minnesota Mining and Manufacturing Company from all sources in the year 1930 was \$685,707.54. The Minnesota Mining and Manufacturing Company had no income attributable to Wisconsin prior to 1930.

Mr. Miller: May it be stipulated then that the net income of the Minnesota Mining Company for Wisconsin for the year 1931 was \$11,527.69, and the total income of the taxpayer from all sources for the same year was \$649,547.09? That in the year 1932 the taxpayer had no income in the State of Wisconsin but sustained a net loss of \$920.77 and during that same year 1932 the total income of the taxpayer was \$448,588.07. That in the year 1933 the Minnesota Mining Company had an income in the State of Wisconsin of \$10,212.78, and a total income from all sources of \$899,829.21. That in the year 1934 the taxpayer had no income in the State of Wisconsin, but a net loss of \$15,216.23, and in the same year 1934 the total income of the taxpayer from all sources was \$1,203,820.30. Is that correct, Mr. Best?

31 Mr. Best: How about taking the other year?

Mr. Connolly: That 1935 is in.

Mr. Best: 1935 is in but not 1936.

Mr. Connolly: 1936 hasn't entered the picture yet.

Mr. Best: You have offered to prove 1936 figures with respect to royalties and with respect to interest. Now if it is material, certainly the 1936 income is.

Mr. Connolly: That is all right, we have no objection.

Mr. Best: Why not add 1935 and 1936 to your stipulation.

Mr. Miller: That in 1935 the Minnesota Mining Company had a net income in Wisconsin of \$261,157.62 subject to an offset for the previous year's loss and a total income from all sources of \$1,764,460.30.

Mr. Best: The computation of which is shown in the stipulation.

Mr. Connolly: That \$663,000 is in dispute.

Mr. Best: Yes, the manner in which this \$764,460 item was arrived at from the book income is shown in the stipulation.

Mr. Connolly: No, not from the book income.

Mr. Best: Yes.

Mr. Connolly: That is the way it is arrived at but that isn't the book income.

Mr. Miller: Paragraph two shows the book income, we contend.

Mr. Best: Well, suppose we add at this point, then, in computing the total income you have just given for the year 1935, there was deducted an amount of \$663,656.66 which was the loss computed by the auditor

to have been sustained in the Baeder Adamson Paper Mills, Incorporated, stock.

Mr. Miller: Yes, in that year.

Mr. Best: In that year.

Mr. Miller: While the taxpayer contends that the loss of 243 thousand sustained in that year—that the taxpayer, Minnesota Mining Company derived a net income from its Wisconsin operations in the year 1936 of \$183,521.31 and a total income from all sources of \$3,064,903.

Mr. Best: Those figures are agreed to as being correct with the two explanatory notes which are included in the stipulation.

Commissioner Mount: And without conceding the materiality.

Mr. Best: That is right.

Commissioner Mount: As to the years prior to 1935.

Mr. Best: And as to 1936.

By Mr. Miller:

The dividends paid by the Minnesota Mining and Manufacturing Company in 1931 were \$548,178.60; in 1932 were \$500,001.66; in 1933, were \$381,071.48; in 1934, \$566,671.61; in 1935, \$690,738.54. These figures do not include dividends on, treasury stock.

34 On January 1, 1935, using the formula for determining the Wisconsin's share for dividends paid, all the income received by the Minnesota Mining and Manufacturing Company had been distributed prior to January 1, 1935.

Our computation shows that an excess of approximately \$6,000, without taking into account that share of dividends which should be allocated according to the formula in those two years, we sustained losses in Wisconsin, namely, 1932 and 1934.

35 In those two years the total dividends paid were \$1,071,812.62.

By Mr. Best:

In making the computation for the year's activities of the net income derived from Wisconsin's activities, I have taken the ratio of the net to the total net income of the company for the same year and have applied the percentage to the dividends paid in the succeeding year and by that means allocated dividends to Wisconsin 36 earnings. The sum of these dividends was \$6,000 in excess of the total income from the Wisconsin operations, not taking into consideration this million dollar dividend. The losses in Wisconsin were about \$16,000, leaving a deficit from Wisconsin operations of \$10,000 without considering the dividends paid in the two loss years.

By Mr. Miller:

37 Testimony as to Baeder Adams loss (omitted).

The total book income of the Minnesota Mining and Manufacturing Company for the year 38 1935 was \$2,250,775.45. This included the ten thousand odd dollars received by the Minnesota Mining and Manufacturing Company from federal

securities. It included the interest and royalties received during the same year.

39. Mr. Connolly: There is only one other matter we have, and that is our protest in paragraph six should be amended to conform with the stipulation with reference to the B. A. loss and paragraph seven should be amended to conform with Exhibit 7 and paragraph 8 should be changed to conform with the offer of proof with reference to the 1936 intangible income from interest and dividends.

Mr. Best: No objection.

By Mr. Best:

The assets shown as cash, real estate, buildings, machinery, colorquartz machinery and inventory are taken from the general ledger. The inventory is taken from subsidiary record and these figures are included in the inventory account in the general ledger. We have one depreciation account in the general ledger and we have subsidiary record bearing out these figures. These records are actually taken from the subsidiary record and the Wisconsin earnings were taken from the Wisconsin returns and are the accrued state income tax determined by the audit report and the net advances are balancing figures. They do not appear on the books. There is no attempt to allocate Wisconsin stock to Wausau activities.

41 By Mr. Miller:

None of the interest on any of the bonds which was received by the Minnesota Mining and

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Manufacturing Company for the years 1935 and 1936 were secured by any mortgage or trust deed on any Wisconsin property and none of the dividends were received on any stock from any company operating or doing business in the State of Wisconsin in the years 1935 and 1936.

44-53 DECISION OF TAX COMMISSION.

(Omitting title.)

44 This matter involves an assessment of privilege dividend taxes under the provisions of Section 3 of Section 71.60, Stats. 1937, with respect to dividends paid in 1936. The assessment is the result of a field audit by the Tax Commission's auditor.

45 The taxpayer offers evidence to the effect that the Minnesota Mining and Manufacturing Company, the appellant herein, is a corporation duly organized and existing by virtue of the laws of the state of Delaware, with its principal place of business in the city of St. Paul, state of Minnesota, and operating a factory for the manufacturing of colorquartz at Wausau, Wisconsin. The First Trust Company of St. Paul is the transfer agent for the taxpayer. All dividends were declared at a meeting of the board of directors in St. Paul, and all dividends paid by the taxpayer during the period affected by the tax in question were paid to the transfer agent in St. Paul by a check drawn on a St. Paul bank and by it distributed to the stockholders of the taxpayer. The

taxpayer had 961,260 shares of common stock distributed in practically every state in the Union; 3,006 shares of stock were owned by residents of the state of Wisconsin. There was no preferred stock outstanding.

The sales of the products of the taxpayer are largely made from the Chicago office of the taxpayer, and the proceeds of such sales are remitted by the purchaser directly to the St. Paul office of the taxpayer and deposited by the taxpayer in banks in St. Paul. All books and records covering the Wausau operations of the taxpayer are kept in St. Paul. All wages are paid directly from St. Paul. The receipts from the Wausau factory are commingled with the earnings from the taxpayer's factories at other places outside the state.

During the year 1930, the taxpayer acquired all of the outstanding capital stock of the Baeder Adamson Paper Mills, Inc., Philadelphia, Penn., for a consideration of \$1,267,306.66 for 10,000 shares. A year or two later, they sold 5,000 shares for \$633,650. During the year 1931, this concern discontinued operations, and, in 1935, the buildings were sold to a wrecking company for \$1,500 and the land was sold during the same year at a sheriff's sale to satisfy creditors.

46 In 1933 and 1934, after the Baeder-Adamson Paper Mills, Inc., discontinued operations, taxpayer set up on its books a reserve for loss on this stock in the amount of \$390,656.66. When the property was sold in 1935, the loss charged on the books of the taxpayer was the sum of \$243,000. The state's auditor, in determining this tax,

charged off \$633,656.66 as a loss in 1935, thus reducing the taxpayer's total income from \$2,155,116.96 to \$1,764,460.30 and increasing the Wisconsin percentage of its total income from 12.1180 to 14.8010.

The auditor did not charge a tax on the dividend of \$371.25 on the taxpayer's treasury stock paid on January 2, 1936. The difference between the auditor's figures as to dividends paid and taxpayer's figures of dividends actually paid is accounted for by the fact that the auditor has imposed a tax on subsequent dividends of \$1,866.25 on the taxpayer's treasury stock.

On August 13, 1937, the Income Tax Division duly notified the taxpayer that it owed a privilege dividend tax of \$6,382.75, with interest amounting to \$501.01, computed to September 30, 1937; and on August 18, 1937, the taxpayer duly applied for hearing on said privilege dividend tax before the Wisconsin Tax Commission.

The taxpayer contends that its Wisconsin business is susceptible to separate accounting, and the taxpayer has filed its 1936 income tax return on a basis of separate accounting, which return has been approved by the Income Tax Division on that basis.

47

In 1935 and 1936, the taxpayer received income from intangible property, including royalties, dividends, and interest, some of the interest being on securities issued by the United States Government. None of the intangibles had a situs in Wisconsin, and the auditor for the Tax Commission did not include any part of the income

from intangible property. The income from intangibles was included by the auditor in total income in determining the ratio of Wisconsin income to such total income.

In 1936, Minnesota Mining and Manufacturing Company held shares of its own stock in its treasury. In the balance sheets this stock was shown among the liabilities as outstanding stock and among the assets as an investment. In paying dividends, the taxpayer issued one check to its transfer agent for the total amount of the dividend and the transfer agent then issued dividend checks to the stockholders. Dividends on treasury stock were included in the check drawn to the transfer agent and the taxpayer received from such agent a check for the dividends on treasury stock. The amounts thus received in 1936 totaled \$2,237.50, of which \$371.25 was paid on January 2, 1936, and the remainder of \$1,866.25 was paid subsequent to that date.

48 The auditor incorrectly applied a tax rate of 2.5641 per cent to the portion of the dividends which the auditor determined were paid out of Wisconsin income.

The first question to be determined by the Commission is whether or not the privilege dividend tax law is constitutional. The Commission has held in different cases that it has no power to pass upon the constitutionality of the privilege dividend tax law. Furthermore, the Commission is of the opinion that the constitutionality of the

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Record.

privilege dividend tax law was passed upon *State ex rel. Froedtert G. & M. Co. vs. Tax Comm.*, 221 Wis. 225.

The next question is whether the privilege dividend tax may be imposed with respect to dividends paid on treasury stock. It is generally conceded that every person owning stock has the same right to share in dividends, in accordance with the rule laid down in *Hartley vs. Pioneer Iron Works*, 181 N. Y. 73; 73 N. E. 576. Eight states have deemed it necessary to provide by statute that no dividends be paid on treasury stock. The fact that these eight states have thought it necessary to enact such legislation is an argument in favor of the proposition that if there is no such statute, and Wisconsin has none, then treasury stock is entitled to participate in dividends. In the same case it is held that dividends may be declared on treasury shares, to be applied to the purchase price of the shares for the benefit of certain persons who have contracted to buy them.

49 In the instant case, the corporation paid the dividends on its treasury stock, the money was turned over to the fiscal agent, and a dividend check was returned to the corporation. Under the facts as shown in this case, and the rule laid down in the *Hartley* case, and in accordance with Subsection (7) of the dividend tax law, which provides that dividends shall be defined as they are in Section 71.02 of the statutes, the Commission must hold that the treasury stock of this corporation was properly assessed.

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Record.

Did the income tax auditor base the privilege dividend taxes as assessed solely upon income earned in Wisconsin? The taxpayer's brief states that the Wisconsin income was only \$245,941.39, while the auditor's report shows that the income out of the Wisconsin business amounted to \$248,927.48. But by reason of the concession relating to Baeder Adamson Paper Mills, Inc., stock, the dividends from Wisconsin income are reduced to approximately \$218,000. While this disposes of the taxpayer's argument, it should be noted that the 1935 Wisconsin income was \$261,157.62, and it must be accepted as the amount of Wisconsin income available for dividends. The figure used by the taxpayer is nowhere shown in the record but is computed by deducting the 1934 loss of \$15,216.23 from the 1935 admitted income. The fact that in a computation of normal income taxes the Legislature has allowed 1935 income to be offset by the 1934 net business loss is without effect in the computation of the earnings attributable to Wisconsin for privilege dividend tax purposes and has no effect upon the amount of 1935 income available for dividends.

50

Are the privilege dividend taxes, as determined by the auditor, based in part upon dividends on income from intangible property? The taxpayer contends that the tax has been imposed with respect to dividends paid out of royalties, dividends and interest received, including the interest on federal securities. This argument proceeds from the assumption that all of the income from intangible property received in 1935 was paid out in 1936 dividends. There is nothing in

the record to support this argument. There is nothing to show that the proportion of intangible income paid out in dividends is any higher or any different than the proportion of other types of income thus distributed. The ratio of total dividends of \$1,682,200.05 to total income of \$2,007,460.30 is roughly 85 per cent. That proportion of the total income was paid out in dividends and there is no ground for the assertion that any higher percentage of income from intangible property was distributed to the stockholders.

51

The interest, dividends and royalties are included in total income but are not included in Wisconsin income. They are thus treated as income from sources outside of the state, and the method of computation used by the auditor does not impose a privilege dividend tax on their distribution. The result reached by this computation is the same result which would be reached if the ratio of total dividends to the total income were to be applied to the Wisconsin income, and this clearly demonstrates that no privilege dividend tax is imposed with respect to income from intangible property having a situs outside of the state. The taxpayer subtracts the interest, dividends and royalties from the total dividends paid and applies to the remainder a fraction which has as its denominator this total income, including that from intangibles. This method, obviously gives double effect to the intangible income.

The taxpayer's argument that that portion of the loss which was charged to the reserve should not be used to reduce 1935 income, since provision for this loss had to that extent been made

in prior years, and that such portion of the loss should be ignored in determining the 1935 income available for dividends, was well taken. The auditor was mistaken in using the tax rate of 2.5641 per cent in computing the privilege dividend taxes here involved. The rate which should have been used is 2.5 per cent, and the taxes should be recomputed to give effect to this change.

52

FINDINGS.

THE COMMISSION FINDS That the privilege dividend tax in the instant case was properly assessed on treasury stock.

IT FURTHER FINDS That the income tax auditor assessed the privilege dividend taxes solely upon income earned in Wisconsin.

IT FURTHER FINDS That the ratio of total dividends of \$1,682,200.05 to total income of \$2,007,460.30 is roughly 85 per cent. That proportion of the total income was paid out in dividends and there is no ground for the assertion that any higher percentage of income from intangible property was distributed to the stockholders. The interest, dividends and royalties are included in total income but are not included in Wisconsin income, and the method of computation used by the auditor does not impose a privilege dividend tax on their distribution.

IT FURTHER FINDS That that portion of the loss which was charged to the reserve should

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not be used to reduce the 1935 income since provision for this loss had to that extent been made in prior years, and that such portion of the loss should be ignored in determining the 1935 income available for dividends.

IT FURTHER FINDS That the auditor was mistaken in using the tax rate of 2.5641 per cent in computing the privilege dividend taxes here involved. The rate which should have been used is 2.5 per cent.

53 **IT FURTHER FINDS** That it has no power to pass upon the constitutionality of the privilege dividend tax law.

DECISIONS.

IT IS, THEREFORE, ORDERED That the assessment herein be recomputed in accordance with our findings.

IT IS FURTHER ORDERED That the assessment as recomputed be placed on the tax roll, and that proper notice be given to the parties to this appeal of this decision.

Dated at the State Capitol, Madison, Wisconsin, this 19th day of December, 1938.

WISCONSIN TAX COMMISSION

W. J. Conway,
Henry A. Gunderson,
Herbert L. Mount,
Commissioners.

55 Return Receipt of Registered Mail Sending
Tax Commission's Decision (omitted).

56 Letter of Transmittal of Tax Commission's
Decision to Minnesota Mining and Manufac-
turing Company, Dated Jan. 1939 (omitted).

57-58 Recomputation of Tax Enclosed in Letter
of January 4, 1939 (omitted). Copy attached
to Taxpayer's Notice of Appeal to Circuit
Court of Dane County. Record 122-123.

124-125 Admissions of Service of Notice of Appeal
to Circuit Court of Dane County by Attorney
General (omitted).

128 Admission of Service of Appellant's Brief
by Attorney General on *February 16, 1939*
(omitted).

129-206 Appellant's Brief on Appeal to Circuit
Court of Dane County (omitted).

208-271 Respondent's Brief on Appeal to Circuit
Court of Dane County (omitted).

273-274 Stipulation Consenting to Immediate Hear-
ing on Appeal Before Court of Dane County
(omitted).

275-276 MEMORANDUM DECISION AND OR-
DER CONFIRMING ASSESSMENT OF
WISCONSIN TAX COMMISSION.

(Omitting title.)

275 The above entitled matter comes before this
Court upon appeal taken by Minnesota Mining

and Manufacturing Company, a foreign corporation, from decision and order of the Wisconsin Tax Commission dated December 19th, 1938.

Briefs were filed by John L. Connolly, Esq., of St. Paul, Minnesota, Frederick J. Miller, Esq. of Little Falls, Minnesota, and Ela, Christianson & Ela of Madison, Wisconsin, representing the Minnesota Mining and Manufacturing Company, appellant, and by the Attorney General of the State of Wisconsin and H. H. Persons, Esq., Assistant Attorney General, representing the respondent.

The court has considered the issues and matters raised on this appeal and which are covered in briefs filed by the respective parties, and particularly the constitutional question raised by the appellant; in view of the decision of the Supreme Court of the State of Wisconsin in the case of *State of Wis. ex rel., Froedert Grain & Malting Co., Inc. vs. Wisconsin Tax Commission*, 221 Wis. 225, and particularly in view of the decision rendered on the motion for rehearing in that case, this Court feels that it has no alternative except to hold the law under which the assessments were levied constitutional; and accordingly the said order of the Wisconsin Tax Commission affirming the assessment or assessments involved in this appeal should be confirmed. The other issues presented upon the appeal are also decided in favor of the Wisconsin Tax Commission.

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276 *IT IS, THEREFORE, ORDERED, that the assessment involved on this appeal by the Wisconsin Tax Commission against Minnesota Mining and Manufacturing Company, a foreign corporation, be and the same is hereby confirmed, and that judgment confirming said assessment be entered herein.*

AUGUST C. HOPPMANN,
Circuit Judge.

Dated, June 10, 1939.

278 Waiver of Notice of Application for Entry of Judgment (omitted).

280-281 **JUDGMENT.**

(Title omitted|)

280 At the regular March 1939 term of the Circuit Court, begun and held in the Court House in the City of Madison in said county, and on the 10 day of June, 1939 of said term. Present the Hon. August C. Hoppmann, Circuit Judge presiding.

The above entitled proceeding was brought to review an order of the Wisconsin Tax Commission dated December 19th, 1938, which said order of the Wisconsin Tax Commission affirmed the assessments and the tax imposed upon dividends declared by the Minnesota Mining and Manufacturing Company, a foreign corporation, being dividends of January 2nd, 1936, April 1st, 1936, July 1st, 1936, October 1st, 1936 and December

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22nd, 1936; the matter coming on to be heard at said term under the provisions of the Wisconsin Statutes, and particularly Sec. 71.16 thereof, the appellant appearing by John L. Connolly, Esq. of St. Paul, Minnesota, Frederick J. Miller, Esq. of Little Falls, Minnesota, and Ela, Christianson & Ela of Madison, Wisconsin, its attorneys, and the respondent appearing by the Attorney General and Harold H. Persons, Esq., Assistant Attorney General of the State of Wisconsin, and the Court having on this 10 day of June, 1939 filed its decision confirming said order and said assessment and tax and directing that judgment be entered in accordance therewith, and notice as provided by Sec. 71.16 (8), Wisconsin Statutes, of application for the entry hereof having been duly waived in writing by the attorneys for the appellant Minnesota Mining and Manufacturing Company,

281 company, a foreign corporation,

Now, therefore, on the records, files and proceedings in the above entitled appeal, and on motion of the attorneys for the Wisconsin Tax Commission,

IT IS ADJUDGED that said order of the Wisconsin Tax Commission dated December 19th, 1938 and said assessment and tax be and the same are in all respects confirmed without costs to either party, except that the appellant Minnesota Mining and Manufacturing Company, a foreign corporation, shall pay the clerk's fee.

By the Court,

AUGUST C. HOPPMANN (Copy)
Judge

NOTICE OF APPEAL TO SUPREME
COURT

(Title omitted.)

YOU WILL PLEASE TAKE NOTICE that Minnesota Mining and Manufacturing Company, a foreign corporation, appellant in this proceeding, hereby appeals to the Supreme Court of the State of Wisconsin from the judgment rendered and entered in this proceeding in the Circuit Court for Dane County, Wisconsin on the 10th day of June, 1939, in favor of the respondent and against the appellant, confirming an order of the Wisconsin Tax Commission dated December 19th, 1938 and an assessment and tax referred to therein, and from the whole of said judgment.

A copy of said judgment appealed from is hereto annexed.

Dated, June 12th, 1939.

JOHN L. CONNOLLY,
FREDERICK J. MILLER,
ELA, CHRISTIANSON & ELA,
Attorneys for Appellant.

To: John E. Martin, Esq.
Attorney General of State of Wisconsin.

Harold H. Persons, Esq.
Asst. Attorney General of State of Wis.

Clerk of the Circuit Court for Dane County,
Wisconsin.

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284-285 Copy of Judgment Attached to Notice of
Appeal (omitted).

286 Undertaking on Appeal (omitted).

287 Power of Attorney to Agent to Execute
Bond (omitted).

288 Admission of Service of Notice of Appeal
by Attorney General and Clerk of Circuit Court
June 13, 1939 (omitted).

289 Return of Clerk of Circuit Court of Dane
County to Supreme Court of Wisconsin on Ap-
peal (omitted).

Respectfully submitted,

JOHN L. CONNOLLY, Esq.,
of St. Paul, Minnesota,

FREDERICK J. MILLER, Esq.,
of Little Falls, Minnesota,

ELA, CHRISTIANSON & ELA,
of Madison, Wisconsin.
Attorneys for Appellant.

Pleas before the Supreme Court of the State of Wisconsin at a term thereof begun and held at the Capitol in Madison, the seat of government of said State on the Second Tuesday, to-wit: the Eighth day of August, A. D. 1939.

Present: Hon. Marvin B. Rosenberry, Chief Justice; Hon. Chester A. Fowler, Hon. Oscar M. Fritz, Hon. Edward T. Fairchild, Hon. John D. Wickhem, Hon. George B. Nelson, Hon. Joseph Martin, Justices.

Arthur A. McLeod, Clerk.

Be it remembered that heretofore, to-wit: on the fifteenth day of June in the year of our Lord One Thousand Nine Hundred and Thirty-nine came into the office of the Clerk of the Supreme Court of the State of Wisconsin, the Minnesota Mining & Manufacturing Company, a foreign corporation, by its attorneys and filed in said Court its certain Notice of Appeal, according to the statute in such case made and provided, and also the Return to such appeal, of the Clerk of the Circuit Court of Dane County, in said State, in words and figures following, that is to say:

Circuit Court, Dane County, Wis. Filed Jun. 13, 1939.
Myrtle L. Hansen, Clerk.

STATE OF WISCONSIN,

In Circuit Court for Dane County:

MINNESOTA MINING AND MANUFACTURING COMPANY, a foreign corporation, Appellant,

vs.

WISCONSIN TAX COMMISSION, Respondent

NOTICE OF APPEAL

You Will Please Take Notice that Minnesota Mining and Manufacturing Company, a foreign corporation, appellant in this proceeding, hereby appeals to the Supreme Court of the State of Wisconsin from the judgment rendered and entered in this proceeding in the Circuit Court for Dane County, Wisconsin on the 10th day of June, 1939, in favor of the respondent and against the appellant, confirming an order of the Wisconsin Tax Commission dated December

19th, 1938 and an assessment and tax referred to therein, and from the whole of said judgment.

A copy of said judgment appealed from is hereto annexed.

Dated, June 12th, 1939.

John L. Connolly, Frederick J. Miller, Ela, Christianson & Ela, Attorneys for Appellant.

To John E. Martin, Esq., Attorney General of State of Wisconsin.

Harold H. Persons, Esq., Asst. Attorney General of State of Wis.

_____, Clerk of the Circuit Court for Dane County, Wisconsin.

Filed Jun. 15, 1939. Arthur A. McLeod, Clerk of Supreme Court, Madison, Wis.

Circuit Court, Dane County, Wis. Filed June 13, 1939. Myrtle L. Hansen, Clerk.

Filed Jun. 15, 1939. Arthur A. McLeod, Clerk of the Supreme Court, Madison, Wis.

STATE OF WISCONSIN,

In Circuit Court for Dane County:

MINNESOTA MINING AND MANUFACTURING COMPANY, a foreign corporation, Appellant,

vs.

WISCONSIN TAX COMMISSION, Respondent

JUDGMENT

At the regular March, 1939; term of the Circuit Court, begun and held in the Court House in the City of Madison in said county, and on the 10th day of June, 1939, of said term. Present the Hon. August C. Hoppmann, Circuit Judge, presiding.

The above entitled proceeding was brought to review an order of the Wisconsin Tax Commission dated December 19th, 1939, which said order of the Wisconsin Tax Commission affirmed the assessments and the tax imposed upon dividends declared by the Minnesota Mining and Manufac-

turing Company, a foreign corporation, being dividends of January 2nd, 1936, April 1st, 1936, July 1st, 1936, October 1st, 1936 and December 22nd, 1936; the matter coming on to be heard at said term under the provisions of the Wisconsin Statutes, and particularly Sec. 71.16 thereof, the appellant appearing by John L. Connolly, Esq., of St. Paul, Minnesota, Frederick J. Miller, Esq., of Little Falls, Minnesota, and Ela, Christianson & Ela of Madison, Wisconsin, its attorneys, and the respondent appearing by the Attorney General and Harold H. Persons, Esq., Assistant Attorney General of the State of Wisconsin, and the Court having on this 10th day of June, 1939 filed its decision confirming said order and said assessment and tax and directing that judgment be entered in accordance therewith, and notice as provided by Sec. 71.16 (8), Wisconsin Statutes, of application for the entry hereof having been duly waived in writing by the attorneys for the appellant Minnesota Mining and Manufacturing Company, a foreign corporation,

Now, therefore, on the records, files and proceedings in the above entitled appeal, and on motion of the attorneys for the Wisconsin Tax Commission,

It Is Adjudged that said order of the Wisconsin Tax Commission dated December 19th, 1938, and said assessment and tax be and the same are in all respects confirmed without costs to either party, except that the appellant Minnesota Mining and Manufacturing Company, a foreign corporation, shall pay the Clerk's fee.

By the Court.

August C. Hoppmann, Judge.

Bond No. S—139815.

STATE OF WISCONSIN, IN CIRCUIT COURT FOR DANE COUNTY

Undertaking on Appeal

MINNESOTA MINING AND MANUFACTURING COMPANY, a foreign corporation, Appellant,

vs.

WISCONSIN TAX COMMISSION, Respondent

Whereas, on the 10th day of June, 1939 in the Circuit Court for Dane County, Wisconsin, a judgment was entered

confirming the order of the Wisconsin Tax Commission dated December 19th, 1938 and the assessment and tax therein referred to, and the said Minnesota Mining and Manufacturing Company feeling aggrieved thereby intends to appeal therefrom to the Supreme Court of the State of Wisconsin.

Now, therefore, the undersigned Royal Indemnity Company of New York City, New York, a corporation duly licensed to do business in the State of Wisconsin, does hereby, pursuant to statute in such case made and provided, undertake that the said appellant will pay all costs and damages which may be awarded against it on said appeal, not exceeding Two Hundred Fifty (\$250.00) Dollars.

Dated at Madison, Wisconsin, this 12 day of June, A. D. 1939.

Royal Indemnity Company of New York. By Theodore Herfurth, Attorney-in-Fact. (Seal.)

In presence of: Mildred Subey, Katherine LaBarro.

Filed Jun. 15 1939. Arthur A. McLeod, Clerk of Supreme Court, Madison, Wis.

Power of Attorney

(Endorsements) Original—State of Wisconsin. Circuit Court, Dane County. Minnesota Mining and Manufacturing Company, a foreign corporation, Appellant, vs. Wisconsin Tax Commission, Respondent. Service admitted this 13th day of June, 1939, Myrtle L. Hansen, Clerk. Circuit Court, Dane County, Wis. Filed Jun. 13, 1939, Myrtle L. Hansen, Clerk.

Notice of Appeal and Undertaking on Appeal

Ela, Christianson & Ela, 1 West Main Street, Madison, Wis., Attorneys for Appellant. Due service admitted this 13th day of June, A. D. 1939. John E. Martin, Atty. Genl. of Wis., by H. H. Persons, Asst. Atty. Genl., Attorneys for Respondent. Filed Jun. 15, 1939, Arthur A. McLeod, Clerk of Supreme Court, Madison, Wis.

And afterwards, to-wit: on the 6th day of November, A. D. 1939, the following stipulation was filed in this cause:

State of Wisconsin, in Supreme Court

August Term, 1939. No. 98

MINNESOTA MINING AND MANUFACTURING COMPANY,
Appellant,

vs.

WISCONSIN TAX COMMISSION, Respondent

Stipulation

It is hereby stipulated and agreed by and between the Appellant-Plaintiff, by its attorneys at law, and John E. Martin, Attorney General of the State of Wisconsin and Harold H. Persons, Assistant Attorney General of the State of Wisconsin, as attorneys for the Wisconsin Tax Commission, Respondent, and for the State of Wisconsin and Elmer E. Barlow, Commissioner of Taxation of Wisconsin, that the State of Wisconsin and Elmer E. Barlow, as Commissioner of Taxation of Wisconsin, may be made parties defendant and respondent in the above-entitled matter and that an order may be made and entered to that effect forthwith and without any further notice to any of the parties.

Dated October 30, 1939.

John L. Connolly, Frederick J. Miller, Ela, Christianson & Ela, Attorneys for Appellant-Plaintiff. John E. Martin, Attorney General of the State of Wisconsin; Harold H. Persons, Assistant Attorney General of the State of Wisconsin, Attorneys for Respondent, Wisconsin Tax Commission, and for the State of Wisconsin and Elmer E. Barlow, Commissioner of Taxation of Wisconsin.

Upon the foregoing stipulation,

It is hereby ordered: That the State of Wisconsin and Elmer E. Barlow, as Commissioner of Taxation of Wisconsin be and the same hereby are made defendants and respondents in the above-entitled matter.

Dated this 6 day of November, 1939.

By the Court.

Arthur A. McLeod, Clerk of the Supreme Court of the State of Wisconsin.

And afterwards to wit on the 7th day of November, A. D. 1939, the same being the 21st day of said term, the following proceedings were had in said cause in this Court:

Dane Circuit Court

MINNESOTA MINING AND MANUFACTURING COMPANY, a foreign corporation, Appellant,

vs.

WISCONSIN TAX COMMISSION, Respondent

And now at this day came the parties herein, by their attorneys, and this cause having been argued by Frederick J. Miller, Esq., John L. Connolly, Esq., and G. Burgess Ela, Esq., for the said appellant, and by Harold H. Persons, Esq., Assistant Attorney General, for the said respondent, and submitted, and the court not being now sufficiently advised of and concerning its decision herein, took time to consider of its opinion.

And afterwards, to wit: on the 16th day of January, A. D. 1940, the same being the 4th day of said term, the judgment of this Court was rendered in words and figures following, that is to say:

Dane Circuit Court

MINNESOTA MINING AND MANUFACTURING COMPANY, a foreign corporation, Appellant,

vs.

WISCONSIN TAX COMMISSION, Respondent

Opinion by Chief Justice Rosenberry

This cause came on to be heard on appeal from the judgment of the Circuit Court of Dane County and was argued by counsel. On consideration whereof, it is now here ordered and adjndged by this Court, that the judgment of the Circuit Court of Dane County, in this cause, be, and the same is hereby, reversed.

And that this cause be, and the same is hereby, remanded to the said Circuit Court with directions to enter judgment setting aside the assessment.

Justice Fowler dissents.

Thereupon the opinion of the Court by Chief Justice Rosenberry was filed in words and figures following, that is to say:

IN SUPREME COURT, STATE OF WISCONSIN, AUGUST TERM,
1939

No. 98

MINNESOTA MINING & MANUFACTURING Co., a foreign corporation, Appellant,

vs.

WISCONSIN TAX COMMISSION, Respondent

Appeal from a judgment of the circuit court for Dane county. August C. Hoppmann, Circuit Judge, presiding. Reversed.

This action was begun on January 25, 1939, by Minnesota Mining and Manufacturing Company, a foreign corporation, plaintiff, against the Wisconsin Tax Commission, defendant, to set aside an assessment of a tax imposed under the provisions of Sec. 3, ch. 505, Laws of 1935, as amended, sec. 70.61, Stats. From the judgment entered on June 10, 1939, confirming the assessment, the plaintiff appeals.

ROSENBERRY, C. J.:

The principal question involved in this case is that considered and determined in the case of J. C. Penney Company vs. Wiscor n Tax Commission, decided herewith. For the reasons stated in that case the judgment in this case must be reversed.

By the Court.—The judgment appealed from is reversed and cause remanded with directions to enter judgment setting aside the assessment.

STATE OF WISCONSIN, IN SUPREME COURT

MINNESOTA MINING & MANUFACTURING Co., a foreign corporation, Appellant,

vs.

WISCONSIN TAX COMMISSION, Respondent

I, Arthur A. McLeod, Clerk of the Supreme Court of the State of Wisconsin, do hereby certify that the above and

foregoing is a true and correct transcript of all the record and proceedings now on file and of record in my office with all things concerning the same in the above entitled cause in this Court.

In Witness Whereof, I have hereunto set my hand and affixed the seal of said Court at Madison, this 29th Day of March, A. D. 1940.

Arthur A. McLeod, Clerk of Supreme Court, Wisconsin. (Seal.)

SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed May 20, 1940

The petition herein for a writ of certiorari to the Supreme Court of the State of Wisconsin is granted.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

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FILE COPY

Office - Supreme Court, U. S.

FILED

APR 10 1940

CHARLES ELMORE GROPLEY
CLERK

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1939

No. 894

48

STATE OF WISCONSIN AND ELMER E. BARLOW, AS
COMMISSIONER OF TAXATION OF THE STATE OF WISCONSIN,
Petitioners,

vs.

MINNESOTA MINING AND MANUFACTURING COMPANY, A DELAWARE CORPORATION.

PETITION FOR WRIT OF CERTIORARI TO THE
SUPREME COURT OF THE STATE OF WISCONSIN.

JOHN E. MARTIN,
Attorney General of Wisconsin,
JAMES WARD RECTOR,
Deputy Attorney General of Wisconsin,
HAROLD H. PERSONS,
Assistant Attorney General of Wisconsin,
Counsel for Petitioners.

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Point C. On the contrary, applicable deci- sions of this Court sustain the validity of said Section 3 of Chap- ter 505, Laws of Wisconsin, 1935 (as amended), as applied to the Minnesota Mining and Manufac- turing Company in the present case	19

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TABLE OF CASES CITED.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1939

No. 894

STATE OF WISCONSIN AND ELMER E. BARLOW, AS
COMMISSIONER OF TAXATION OF THE STATE OF WISCONSIN,

Petitioners,

vs.

MINNESOTA MINING AND MANUFACTURING COMPANY, A DELAWARE CORPORATION.

PETITION FOR WRIT OF CERTIORARI.

May It Please the Court:

The petition of the State of Wisconsin and Elmer E. Barlow, as Commissioner of Taxation of the State of Wisconsin, respectfully shows to this Honorable Court:

A.

Summary Statement of the Matter Involved.

This petition is filed to obtain a review of the judgment of the Supreme Court of the State of Wisconsin, dated January 16, 1940, in the case of *Minnesota Mining and Manufacturing Company, a foreign corporation v. Wisconsin*.

consin Tax Commission, holding invalid an assessment of taxes against the Minnesota Mining and Manufacturing Company, a Delaware corporation, doing business in the State of Wisconsin pursuant to the laws thereof. The said judgment of the Supreme Court of the State of Wisconsin reversed a judgment of the Circuit Court for Dane County, Wisconsin, confirming an assessment of said taxes against said Minnesota Mining and Manufacturing Company, a corporation, as affirmed by a decision and order of the Wisconsin Tax Commission, dated December 19, 1938 (R. 94).

This petition is companion to the petitions for writs of certiorari, filed with this Court at the same time, to review the judgments of the Supreme Court of Wisconsin, entered on the same date, as the judgment here sought to be reviewed, in the cases of *J. C. Penney Company, a foreign corporation v. Wisconsin Tax Commission*, and *F. W. Woolworth Company, a foreign corporation v. Wisconsin Tax Commission*. The judgments in the three cases, while separate, were entered on the same date and are all based on the opinion of the Supreme Court of Wisconsin filed in the case of *J. C. Penney Company, a foreign corporation v. Wisconsin Tax Commission*. Thus, the petitions to this Court for writs of certiorari in all three cases present the same question and are companion.

The taxes involved, in the sum of \$5,471.06, were assessed pursuant to the provisions of Section 3 of Chapter 505, Laws of Wisconsin of 1935, as amended, which imposes a tax upon corporate dividends paid out of income derived from property located or business transacted in the State of Wisconsin, the same statute involved in the petitions in the *J. C. Penney Company* and *F. W. Woolworth Company* cases, companion hereto. A copy of said Section 3 of Chapter 505, Laws of Wisconsin of 1935, effective upon its publication on September 26, 1935, and as amended by Chapter

552, Laws of Wisconsin of 1935, effective upon publication thereof on October 8, 1935, is printed as an Appendix to this petition.

Said taxing statute is a special act and imposes a tax on "all corporations (foreign and local)" "equal to two and one-half percentum of the amount of" dividends declared and paid, after the passage thereof and prior to July 1, 1937, out of income derived from property located and business transacted in Wisconsin. It provides that such tax shall be deducted and withheld by the corporation from the dividends paid to both residents and nonresidents of Wisconsin and that the corporation is made liable for the tax and the payment thereof.

In Subsection (4) thereof it is specifically provided that as to corporations doing business within and without the State of Wisconsin the tax shall apply only to dividends declared and paid out of income derived from business transacted and property located in Wisconsin and that the amount of income of such a corporation attributable to the State of Wisconsin shall be computed in the same manner as is provided in Chapter 71 of the Wisconsin Statutes, the general Income Tax Law of the State of Wisconsin, for the determination of the income of such type of corporations allocable as Wisconsin income.

The facts involved and upon which the Supreme Court of the State of Wisconsin based its judgment are not in dispute, and, while different, are in substance the same as in the companion case involving the J. C. Penney Company.

The Minnesota Mining and Manufacturing Company is a Delaware corporation, having its statutory office at Wilmington, Delaware, and its principal business office in St. Paul, Minnesota (R. 5). During the years involved it was engaged in the manufacturing business, operated factories at Detroit, Michigan, Copley, Ohio, St. Paul, Minnesota and also a factory at Wausau, Wisconsin, manufacturing roofing

granules (R. 64). It is qualified to do business in the State of Wisconsin under the laws thereof but has no executive office of any kind ~~located~~ within the State (R. 5). Computed on the Wisconsin tax basis, the corporation had a total net income during the year 1935 of \$1,764,460.30. Applying the formula of the Wisconsin income tax statute (Section 71.02, Wisconsin Statutes 1935) \$261,157.62 of the 1935 net income was allocable to Wisconsin business (R. 48).

The Minnesota Mining and Manufacturing Company paid dividends as follows (R. 48):

No. 1 January 2, 1936	\$215,909.83
No. 2 April 1, 1936	216,380.97
No. 3 July 1, 1936	288,278.00
No. 4 October 1, 1936	336,441.00
No. 5 December 22, 1936	624,819.00
 Total	 \$1,681,828.80

The dividends above shown as paid in April, July, October and December included dividends paid on treasury stock to the aggregate amount of \$1,866.25, but the amount shown above for the dividend paid in January does not include dividends paid on treasury stock that date in the amount of \$371.25 (R. 67). All of said dividends were declared at meetings of the Board of Directors held in St. Paul, Minnesota (R. 43).

The products of the Wausau plant are shipped to Chicago and points west, and the sales thereof are made through the Company's branch office in Chicago, Illinois. Pricing and billing the customer is done at the St. Paul, Minnesota office. The customer remits directly to the St. Paul office and the proceeds are deposited in banks in St. Paul, Minnesota (R. 64), where they are co-mingled with funds from other factories and income from other sources. The funds in said bank are used to pay expenses, royalties

and dividends (R. 65). Employees of the Wausau, Wisconsin plant are paid as follows: After the payroll is prepared and sent to the main office at St. Paul, checks are there drawn on a Wausau bank and sent to the Wausau plant manager for distribution. On the same day a deposit in the amount of the total payroll is sent by the main office to the Wausau bank to meet the payroll checks (R. 65). The method of payment of each of said dividends was that the Company drew one check on its bank account in St. Paul, Minnesota for the full amount of the dividend, including the amount paid on the treasury stock, payable to its transfer agent in St. Paul, Minnesota, which in turn paid the dividends therefrom to the individual stockholders and returned to the corporation the dividends declared and paid on the treasury stock (R. 68). No act in connection with the payment of dividends was performed within the State of Wisconsin and no act in connection with the receipt of such dividend was performed in the State of Wisconsin except that certain stockholders lived and received their mail in Wisconsin (R. 8). As of January 1, 1936 there were 42 stockholders of the company owning 3,006 shares, who were residents of the State of Wisconsin, and on January 1, 1938 there were 44 stockholders owning 4,944 shares who were residents of the State of Wisconsin. The Company had 961,260 shares of common stock outstanding, which were owned in practically every State in the Union (R. 64).

Pursuant to a notice of an additional assessment dated August 13, 1937, in accordance with the procedural provisions of the Wisconsin statutes, the Wisconsin Tax Commission assessed a tax against the said Minnesota Mining and Manufacturing Company, a corporation, pursuant to the provisions of Section 3 of Chapter 505, Laws of Wisconsin of 1935, as amended, which was ultimately adjusted at the sum of \$5,471.06 (R. 46). The corporation duly filed its

objections to said assessment and applied for a hearing thereon within the period, in the manner and as provided by the Wisconsin Statutes in such instances (R. 48). Thereupon the matter was heard by the Wisconsin Tax Commission and on December 19, 1938 it entered a decision and order sustaining the assessment of said taxes, as adjusted in the amount of \$5,471.06, exclusive of interest and penalties (R. 74).

The assessment of said taxes and the decision and order of the Wisconsin Tax Commission sustaining the same, upon the application of the corporation pursuant to the provisions therefor in the Wisconsin Statutes, were duly reviewed by the Circuit Court for Dane County, Wisconsin, and on June 10, 1939 judgment was entered therein confirming the same (R. 85). Upon appeal therefrom by the Minnesota Mining and Manufacturing Company in accordance with the Wisconsin Statutes, the Supreme Court of the State of Wisconsin on January 16, 1940 rendered its decision and judgment reversing the judgment of said Circuit Court and holding that said taxes so assessed, and the provisions of Section 3 of Chapter 505, Laws of Wisconsin of 1935, as amended, as applied to said Minnesota Mining and Manufacturing Company, under the facts as stated, were invalid as depriving the said Minnesota Mining and Manufacturing Company, a corporation, of its property without due process of law in violation of the Fourteenth Amendment to the Constitution of the United States, based upon the opinion filed and the decision of the Supreme Court of Wisconsin in the case of *J. C. Penney Company, a foreign corporation, v. Wisconsin Tax Commission*, on the same date (R. 95). It is this decision and judgment of the Supreme Court of the State of Wisconsin that is here sought to be reviewed.

The record upon which this petition is here presented is composed of the printed case as used in the Supreme Court of the State of Wisconsin, being pages numbered 1 to 88

of the Record as certified to this Court, together with the opinion of the Supreme Court of the State of Wisconsin and the proceedings therein, comprising pages numbered 89 to 96 of the Record as certified to this Court.

B.

Reasons Relied On for the Allowance of the Writ.

The reasons relied upon for the allowance of the writ are the same as those set out in the petition for certiorari in the companion cases of *J. C. Penney Company v. Wisconsin Tax Commission* and *F. W. Woolworth Company v. Wisconsin Tax Commission*.

1. The question presented is the constitutionality of the Wisconsin tax statute, Section 3 of Chapter 505, Laws of 1935 (as amended) as applied to the Minnesota Mining and Manufacturing Company, a Delaware corporation doing business in Wisconsin, under the facts as previously stated, and of the taxes of \$5,471.06 assessed against said corporation pursuant to said taxing act. The facts relating thereto are not in dispute and are contained in the record made before the Wisconsin Tax Commission. No issue as to the facts was raised or presented in the State courts of Wisconsin and none now exists or is here presented. Likewise, no question has been raised, and none exists, as to the correctness of the procedure in the assessment of the taxes involved or in the review of the assessment in the court proceedings. Consequently, a discussion of those procedural matters is not relevant to the purposes of this petition. The only controversy at issue involved in the proceedings in the State courts and decided by the Supreme Court of Wisconsin in rendering the judgment sought to be reviewed, is whether the Fourteenth Amendment to the Constitution of the United States precludes the State of Wisconsin from imposing the tax as provided in Section 3 of Chapter 505, Laws of 1935 (as

amended), upon the Minnesota Mining and Manufacturing Company, a foreign corporation, under the facts set out in the record. This is solely a question of law and purely a Federal question. The judgment of the Supreme Court of Wisconsin sought to be reviewed is based solely on its decision upon that question. The petitioners contend that its decision upon said Federal question is erroneous and should be reversed.

2. Following notice of the assessment of the taxes involved and upon appropriate request therefor by the Minnesota Mining and Manufacturing Company, a hearing in respect to said assessment was had and conducted by the Wisconsin Tax Commission, which by order, dated December 19, 1938, sustained the assessment. Thereupon, pursuant to the statutes of Wisconsin providing therefor, the Minnesota Mining and Manufacturing Company appealed from the decision of the Wisconsin Tax Commission to the Circuit Court for Dane County, Wisconsin, and the Supreme Court of Wisconsin, successively. In the application for hearing before the Wisconsin Tax Commission (R. 48), and in the notice of appeal from the order of the Wisconsin Tax Commission to the Circuit Court for Dane County, Wisconsin (R. 2), the claim was made by the Minnesota Mining and Manufacturing Company that Section 3 of Chapter 505, Laws of Wisconsin of 1935 (as amended) as applied to it under the existent facts purports to impose a ~~tax~~ beyond the taxing jurisdiction of the State of Wisconsin and therefore is invalid as violative of the due process provision of the Fourteenth Amendment to the Constitution of the United States. The same claim was made on the appeal to the Supreme Court of Wisconsin, and its decision sustaining said claim of the Minnesota Mining and Manufacturing Company the petitioners contend is erroneous and should be reversed.

3. The Wisconsin Tax Commission held that it was without authority to pass upon the constitutional question involved (R. 77) and the Circuit Court for Dane County, Wisconsin, decided it adversely to the corporation (R. 83), upon the authority of the decision of the Supreme Court of Wisconsin upon the question, rendered in 1936 in *State ex rel. Froedtert G. & M. Co., Inc. v. Tax Commission* (1936), 221 Wis. 225, 265 N. W. 672, 267 N. W. 52, 104 A. L. R. 1478. In the cited case the Supreme Court of Wisconsin in an action for declaratory judgment had expressly declared Section 3 of Chapter 505, Laws of 1935 (as amended) to be constitutional as imposing a tax within the taxing jurisdiction of the State of Wisconsin as applied to both foreign and domestic corporations, over objection that it violated the due process provision of the Fourteenth Amendment to the United States Constitution. Upon appeal by the Minnesota Mining and Manufacturing Company to the Supreme Court of Wisconsin from the judgment of the Circuit Court for Dane County, Wisconsin, confirming the order of the Wisconsin Tax Commission and the adjusted taxes as there sustained, the corporation renewed its objection that as applied to it, Section 3 of Chapter 505, Laws of 1935 (as amended) and the taxes assessed pursuant thereto were violative of the due process provision of the Fourteenth Amendment to the United States Constitution. The Supreme Court of Wisconsin sustained that objection and overruled its prior decision in the case of *State ex rel. Froedtert G. & M. Co., Inc. v. Tax Commission* (1936), 221 Wis. 225, 265 N. W. 672, 267 N. W. 52, 104 A. L. R. 1478, insofar as that prior decision held that said law imposed a valid tax as applied to foreign corporations doing business in Wisconsin under facts the same as those existent as to the Minnesota Mining and Manufacturing Company. The petitioners contend that this decision upon the Federal question involved and overruling the prior decision thereon is erroneous and should be reversed.

4. The said decision of the Supreme Court of Wisconsin to the effect that Section 3 of Chapter 505, Laws of 1935 (as amended) was invalid as applied to foreign corporations was based squarely upon the decision of this Court in the case of *Connecticut General Life Ins. Co. v. Johnson* (1938), 303 U. S. 77, 82 L. Ed. 673, 58 S. Ct. 436, which was decided by this Court subsequently to the decision in the case of *State ex rel. Froedtert G. & M. Co., Inc. v. Tax Commission* (1936), 221 Wis. 225, 265 N. W. 672, 267 N. W. 52, 104 A. L. R. 1478. Upon the basis of the facts existing in the instant case the Supreme Court of Wisconsin held that the decision of this Court in the case of *Connecticut General Life Ins. Co. v. Johnson* (1938), 303 U. S. 77, 82 L. Ed. 673, 58 S. Ct. 436, was controlling and required it to overrule its prior decision upon the question and held that Section 3 of Chapter 505, Laws of Wisconsin, 1935 (as amended), as applied to a foreign corporation doing business in Wisconsin in the manner of the Minnesota Mining and Manufacturing Company, imposes a tax beyond the taxing jurisdiction of the State of Wisconsin. It is the contention of the petitioners that the Supreme Court of Wisconsin erred in so construing and applying the decision of this Court in that case and that said decision is neither controlling nor applicable to the question here involved.

5. The petitioners, moreover, contend that no other decision of this Court holds that a tax such as that provided by Section 3 of Chapter 505, Laws of 1935 (as amended) as applied to foreign corporations doing business in the taxing State under and pursuant to the laws thereof, is contrary to the Fourteenth Amendment to the United States Constitution, and that no decision of this Court requires such a holding or sustains the decision of the Supreme Court of Wisconsin to that effect.

6. The petitioners further contend that although the precise question involved has not been passed upon by this

Court, the decision of the Supreme Court of Wisconsin that Section 3 of Chapter 505, Laws of 1935 (as amended), as applied to foreign corporations doing business in Wisconsin, is invalid as contravening the due process clause of the Fourteenth Amendment to the United States Constitution, is not in accord with applicable decisions of this Court and assign the same as error for which said decision should be reviewed and reversed.

Wherefore, Your petitioners pray that a writ of certiorari be issued out of and under the seal of this Honorable Court, directed to the Supreme Court of the State of Wisconsin, commanding that Court to certify and send to this Court for its review and determination, on a day certain to be therein named, a full and complete transcript of the record and all proceedings in the case numbered and entitled on its docket, No. 98, August Term, 1939, *Minnesota Mining and Manufacturing Company, a foreign corporation, Appellant, v. Wisconsin Tax Commission, Respondent*, and that the said judgment of the Supreme Court of Wisconsin may be reversed by this Honorable Court, and that your petitioners may have such other further relief in the premises as to this Honorable Court may seem meet and just; and your petitioners will ever pray.

THE STATE OF WISCONSIN, AND
ELMER E. BARLOW,
as Commissioner of Taxation
of the State of Wisconsin,

By JOHN E. MARTIN,
Attorney General of Wisconsin,
JAMES WARD RECTOR,
Deputy Attorney General of Wisconsin,
HAROLD H. PERSONS,
Assistant Attorney General of Wisconsin,
Counsel for Petitioners.

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SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1939

No. 894

STATE OF WISCONSIN AND ELMER E. BARLOW, AS
COMMISSIONER OF TAXATION OF THE STATE OF WISCONSIN,
Petitioners,
vs.

MINNESOTA MINING AND MANUFACTURING COMPANY, A DELAWARE CORPORATION.

**BRIEF IN SUPPORT OF PETITION FOR WRIT OF
CERTIORARI.**

The petition herein presents the identical question that is presented in the petitions for writs of certiorari in the two companion cases involving the *J. C. Penney Company* and *F. W. Woolworth Company*, respectively. The jurisdictional claims, errors assigned and arguments are identical with those in the brief in support of the petition in the *J. C. Penney Company* case. While slightly different, the facts, so far as they relate to the question presented, are substantially the same.

I.

The Opinions of the Court Below.

The opinion in the Supreme Court of Wisconsin, filed January 16, 1940, is reported in 289 N. W. 686, but is not as yet reported in the official State reports (R. 95).

II.

Jurisdiction.

1. This petition is filed pursuant to Section 237b of the Federal Judicial Code (28 U. S. C. A. 344(b)) which provides:

“(b) It shall be competent for the Supreme Court, by certiorari, to require that there be certified to it for review and determination, with the same power and authority and with like effect as if brought up by appeal, any cause wherein a final judgment or decree has been rendered or passed by the highest court of a State in which a decision could be had where is drawn in question the validity of a treaty or statute of the United States; or *where is drawn in question the validity of a statute of any State on the ground of its being repugnant to the Constitution*, treaties, or laws of the United States; or *where any title, right, privilege, or immunity is specially set up or claimed by either party under the Constitution*, or any treaty or statute of, or commission held or authority exercised under, the *United States*; and the power to review under this paragraph may be exercised as well *where the Federal claim is sustained as where it is denied*. Nothing in this paragraph shall be construed to limit or detract from the right to a review on an appeal in a case where such a right is conferred by the preceding paragraph; nor shall the fact that a review on an appeal might be obtained under the preceding paragraph be an obstacle to granting a review on certiorari under this paragraph.” (Emphasis ours.)

2. Petitioners also rely on Rule 38 of the Rules of this Court and particularly on paragraph 5 thereof which provides in part:

"5. A review on writ of certiorari is not a matter of right, but of sound judicial discretion, and will be granted only where there are special and important reasons therefor. The following, while neither controlling nor fully measuring the court's discretion, indicate the character of reasons which will be considered:

"(a) Where a State court has decided a Federal question of substance not theretofore determined by this Court, or has decided it in a way probably not in accord with applicable decisions of this Court."

3. The date of the judgment to be reviewed is January 16, 1940 (R. 94).

In its application for a hearing before the Wisconsin Tax Commission upon the assessment involved (R. 54) and in its pleadings upon the statutory appeal to the Circuit Court for Dane County, Wisconsin, from the decision of the Wisconsin Tax Commission confirming the assessment (R. 2), the Minnesota Mining and Manufacturing Company, among other things, claimed immunity from the tax upon the ground that Section 3 of Chapter 505, Laws of Wisconsin, 1935 (as amended) in so far as it imposed a tax upon the company was contrary to the Fourteenth Amendment to the United States Constitution because it taxed beyond the taxing jurisdiction of the State of Wisconsin and thus deprived the Minnesota Mining and Manufacturing Company of its property without due process.

The Circuit Court for Dane County, Wisconsin, upheld the validity of the tax in question as applied to the Minnesota Mining and Manufacturing Company upon the authority of *State ex rel. Froedtert G. & M. Co., Inc. v. Tax Commission*, (1936) 221 Wis. 225, 265 N. W. 672, 267 N. W. 52,

104 A. L. R. 1478, in which case the Supreme Court of Wisconsin in a declaratory judgment in 1936 had expressly sustained the validity of said tax law as applied to both foreign and domestic corporations, over objection that it contravened the due process provisions of the Fourteenth Amendment to the Constitution of the United States (R. 67, 68).

The Supreme Court of Wisconsin, upon appeal from the Circuit Court, sustained the contention of the Minnesota Mining and Manufacturing Company and held that the said Section 3 of Chapter 505 (as amended), was invalid in so far as it purported to impose a tax upon the devolution of dividends of the Minnesota Mining and Manufacturing Company to its stockholders. The court thus expressly overruled its decision in the case of *State ex rel. Froedtert G. & M. Co., Inc. v. Tax Commission*, (1936) 221 Wis. 225, 265 N. W. 672, 267 N. W. 52, 104 A. L. R. 1478, and did so specifically upon the authority of *Connecticut General Life Ins. Co. v. Johnson*, (1936) 303 U. S. 77, 82 L. Ed. 673, 58 S. Ct. 436 (R. 107).

Thus, a statute of the State of Wisconsin was held to be invalid upon the basis of an asserted conflict with the Fourteenth Amendment to the United States Constitution as interpreted by this Court.

The cases upon which petitioner relies in support of jurisdiction are:

Blodgett v. Silberman, (1928) 277 U. S. 1, 72 L. Ed. 749, 48 S. Ct. 410;

Boynton v. Hutchinson Gas Co., (1934) 291 U. S. 656, 78 L. Ed. 1049, 54 S. Ct. 528;

Kelly v. Washington ex rel. Foss Company, (1937) 302 U. S. 1, 82 L. Ed. 3, 58 S. Ct. 87;

Coleman v. Miller, (1939) 307 U. S. 433, 83 L. Ed. 1385, 59 S. Ct. 972.

III.

Statement of the Case.

The controversy at issue arose out of an assessment of taxes, in the amount of \$5,471.06, pursuant to the provisions of Section 3 of Chapter 505, Laws of Wisconsin, 1935 (as amended), against the Minnesota Mining and Manufacturing Company, a Delaware corporation, doing business in the State of Wisconsin under and pursuant to the laws of Wisconsin. A copy of Section 3 of Chapter 505, Laws of Wisconsin, 1935 (as amended by Chapter 552, Laws of Wisconsin, 1935), may be found in the Appendix herein. In substance, it imposes a tax on all corporations, foreign and local, equal to $2\frac{1}{2}\%$ of the amount of dividends declared and paid out of income derived from property located and business transacted in the State of Wisconsin. The corporation declaring the dividend is made liable for the tax and required to deduct the same from the dividend.

The Minnesota Mining and Manufacturing Company, a Delaware corporation, requested a hearing upon the assessment before the Wisconsin Tax Commission (R. 48). The Wisconsin Tax Commission confirmed the assessment (R. 74). The Minnesota Mining and Manufacturing Company appealed to the Circuit Court for Dane County, Wisconsin, and, as appears from the record on said appeal (R. 2), it alleged that Section 3 of Chapter 505, Laws of Wisconsin, 1935 (as amended), so far as it imposed the tax upon the Minnesota Mining and Manufacturing Company, was in conflict with the Fourteenth Amendment to the United States Constitution because it imposed a tax beyond the State's jurisdiction to tax and thereby deprived the company of its property without due process of law.

The Circuit Court for Dane County rejected the company's claim of immunity from the tax and confirmed the assessment (R. 83).

Upon appeal from the judgment of the Circuit Court the Wisconsin Supreme Court reversed the judgment of the Circuit Court and upheld the company's claim to immunity from the tax. Thus, the court held that, in so far as the said Section 3 of Chapter 505 (as amended), imposed a tax upon the devolution of dividends from the Minnesota Mining and Manufacturing Company to its stockholders paid out of income earned in Wisconsin, it was contrary to the Fourteenth Amendment to the United States Constitution (R. 95). While other issues were raised in the case none was decided except the constitutional question to which reference has been made.

The facts material to the consideration of the questions presented have been covered and set out under heading "A" in the petition and in the interests of brevity and elimination of repetition the statement thereof is not here repeated. As previously stated the facts, so far as pertinent to the questions here presented, are in substance the same as those in the two companion cases involving the *J. C. Penney Company* and the *F. W. Woolworth Company*.

IV.

Specification of Errors.

1. The Supreme Court of Wisconsin erred in holding that Section 3 of Chapter 505, Laws of Wisconsin, 1935 (as amended by Chapter 552, Laws of Wisconsin, 1935), as applied to the Minnesota Mining and Manufacturing Company, under the existing facts, imposed a tax beyond the taxing jurisdiction of the State of Wisconsin and therefore is invalid as in conflict with the Fourteenth Amendment to the Constitution of the United States.

2. The Supreme Court of Wisconsin erroneously held that the assessment of the taxes involved, pursuant to the provisions of Section 3 of Chapter 505, Laws of Wisconsin,

1935 (as amended by Chapter 552, Laws of Wisconsin, 1935), against the Minnesota Mining and Manufacturing Company, a corporation, under the existing facts constitutes a deprivation of property of the Minnesota Mining and Manufacturing Company without due process of law because beyond the taxing power of the State of Wisconsin and therefore is invalid as violative of the Fourteenth Amendment to the Constitution of the United States.

V.

ARGUMENT.**Summary of Argument.**

POINT A. The Supreme Court of Wisconsin erroneously predicated the decision on the validity of Section 3 of Chapter 505, Laws of Wisconsin, 1935 (as amended) and the tax thereby imposed upon the decision of this Court in *Connecticut General Life Ins. Co. v. Johnson*, (1938) 303 U. S. 77, 82 L. Ed. 673, 58 S. Ct. 436.

POINT B. This Court has announced on decision construing the Fourteenth Amendment condemning the application of State tax laws such as Section 3 of Chapter 505, laws of Wisconsin, 1935, (as amended) to foreign corporations doing business in the State in the manner of the Minnesota Mining and Manufacturing Company.

POINT C. On the contrary, applicable decisions of this Court sustain the validity of said Section 3 of Chapter 505, laws of Wisconsin, 1935, (as amended) as applied to the Minnesota Mining and Manufacturing Company in the present case.

The arguments in this case upon the above points are identical with the arguments fully stated at length under the heading "V" in the brief in support of the petition

for writ of certiorari in the companion case in this Court, under the title, *State of Wisconsin and Elmer E. Barlow, as Commissioner of Taxation of the State of Wisconsin, Petitioners, v. J. C. Penney Company, a Delaware corporation, respondent*, filed at the same time as this brief. In the interests of brevity and elimination of repetition, such arguments will not be here repeated, but are expressly referred to, incorporated herein, and made a part hereof the same as if repeated and set forth at length herein.

The decision of the Supreme Court of Wisconsin, sought to be reviewed in this case, is based upon its opinion and decision in *J. C. Penney Company, a foreign corporation, v. Wisconsin Tax Commission*, reported in 289 N. W. 677, but not as yet reported in the official reports. The opinion of the Supreme Court of Wisconsin in the instant case reported in 289 N. W. 685 expressly says that the judgment in the instant case was rendered for the reasons stated in its opinion in the case of *J. C. Penney Company, a foreign corporation v. Wisconsin Tax Commission*, reported in 289 N. W. 677.

That counsel for the Minnesota Mining and Manufacturing Company, a Delaware corporation, the respondent herein, may be fully and completely presented with such arguments, copies of the brief in support of the petition for writ of certiorari in the companion case in this Court under the title, *State of Wisconsin and Elmer E. Barlow, as Commissioner of Taxation of the State of Wisconsin, Petitioners, v. J. C. Penney Company, a Delaware corporation, Respondent*, will be furnished and served on respondent and its counsel as a part of and at the same time as the service of the brief herein.

Conclusion.

It is, therefore, respectfully submitted that this case is one calling for the exercise by this Court of its supervisory

powers and that to such end a writ of certiorari should be granted and this Court should review the decision of the Supreme Court of Wisconsin and finally reverse it.

JOHN E. MARTIN,
Attorney General of Wisconsin,

JAMES WARD RECTOR,
Deputy Attorney General of Wisconsin,

HAROLD H. PERSONS,
Assistant Attorney General of Wisconsin,
Counsel for Petitioners.

APPENDIX.

Section 3, Chapter 505, Laws of Wisconsin 1935, Effective on its Publication on September 26, 1935, and as Amended by Chapter 552, Laws of Wisconsin, 1935, Effective on its Publication on October 8, 1935, Provides:

Section 3. Privilege Dividend Tax. (1) For the privilege of declaring and receiving dividends, out of income derived from property located and business transacted in this state, there is hereby imposed a tax equal to two and one-half per centum of the amount of such dividends declared and paid by all corporations (foreign and local) after the passage and publication of this act and prior to July 1, 1937. Such tax shall be deducted and withheld from such dividends payable to residents and nonresidents by the payor corporation.

(2) Every corporation required to deduct and withhold any tax under this section shall, on or before the last day of the month following the payment of the dividend, make return thereof and pay the tax to the tax commission, reporting such tax on the forms to be prescribed by the tax commission.

(3) Every such corporation hereby made liable for such tax, shall deduct the amount of such tax from the dividends so declared.

(4) In the case of corporations doing business within and without the state of Wisconsin, such tax shall apply only to dividends declared and paid out of income derived from business transacted and property located within the state of Wisconsin. The amount of income attributable to this state shall be computed in accordance with the provisions of chapter 71. In the absence of proof to the contrary, such dividends shall be presumed to have been paid out of earnings of such corporation attributable to Wisconsin under the provisions of chapter 71, for the year immediately preceding the payment of such dividend. If a corporation had a loss for the year prior to the payment of the dividend, the tax commission shall upon application, determine

the portion of such dividend paid out of corporate surplus and undivided profits derived from business transacted and property located within the state.

(5) Dividends paid by a subsidiary corporation to its parent shall not be subject to the tax herein imposed provided that the subsidiary and its parent report their income for taxation under the provisions of chapter 71 on a consolidated income return basis, or both corporations report separately.

(6) The provisions of this section shall not apply to dividends declared and paid by a Wisconsin corporation out of its income which it has reported for taxation under the provisions of chapter 71, to the extent that the business of such corporation consists in the receipt of dividends from which a privilege dividend tax has been deducted and withheld and the distribution thereof to its stockholders.

(7) For the purposes of this section dividends shall be defined as in section 71.02, except that the tax herein imposed shall not apply to stock dividend or liquidating dividends.

(8) The tax hereby levied, if not paid within the time herein provided, shall become delinquent and when delinquent shall be subject to a penalty of two per cent on the amount of the tax and interest at the rate of one-half per cent per month until paid.

(9) The tax hereby imposed shall, when collected by the tax commission, be paid by it into the state treasury.

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APR 29 1940

CHARLES ELMORE CROPLEY
CLERK

Supreme Court of the
United States

OCTOBER TERM, 1939

No. [REDACTED]

48

STATE OF WISCONSIN and ELMER E. BARLOW, as Commis-
sioner of Taxation of the State of Wisconsin,

Petitioners,

vs.

MINNESOTA MINING AND MANUFACTURING COMPANY, a Dela-
ware corporation.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF
CERTIORARI TO THE SUPREME COURT OF
THE STATE OF WISCONSIN.

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Supreme Court of the United States

OCTOBER TERM, 1939

No. 894

STATE OF WISCONSIN and ELMER E. BARLOW, as Commissioner of Taxation of the State of Wisconsin,

Petitioners,

vs.

MINNESOTA MINING AND MANUFACTURING COMPANY, a Delaware corporation.

**BRIEF IN OPPOSITION TO PETITION FOR WRIT OF
CERTIORARI TO THE SUPREME COURT OF
THE STATE OF WISCONSIN.**

OPINIONS BELOW.

The decision of the Supreme Court of Wisconsin is reported in 289 N. W. Rep. page 686, but not as yet reported in the official state reports. This decision reverses the judgment of the Circuit Court for Dane County, Wisconsin.

in favor of the appellant and remands the case to the Circuit Court of Dane County with directions to enter judgment setting aside the assessment.

The instant case and the case of *F. W. Woolworth & Co. v. Wisconsin Tax Commission*, reported in 289 N. W. 685, and the case of *J. C. Penney Company v. Wisconsin Tax Commission*, reported in 289 N. W. 677, but not as yet reported in the official state reports, were argued together in the Supreme Court of Wisconsin and decided together by the Supreme Court of Wisconsin.

JURISDICTION.

The judgment of the Supreme Court of Wisconsin in the instant case, dated January 16, 1940, holding that as to the respondent, a tax imposed under Chapter 505, Section 3, of the Session Laws of the State of Wisconsin for 1935, as amended by Chapter 552 of the Laws of 1935, was invalid because in conflict with the due process clause of the Fourteenth Amendment of the Constitution of the United States, and Article VIII, section 1, of the Constitution of the State of Wisconsin; and reversing a judgment of the Circuit Court of Dane County confirming an assessment of privilege dividend tax under said act against the Minnesota Mining and Manufacturing Company as confirmed by a decision and order of the Wisconsin Tax Commission, dated December 19, 1938.

The petition for a writ of certiorari was filed on April 10, 1940, and a copy thereof served upon counsel for respondent on April 17, 1940.

Petitioner urges in its brief a substantial federal question as the only reason for granting a writ of certiorari. This question is whether the state tax involved as applied to the respondent violates the due process clause of the Fourteenth Amendment of the Federal Constitution.

Respondent contests this ground. Its position is that the decision below (1) proceeded upon an independent state ground broad enough to maintain the judgment; namely, that it violated the due process clause of the State Constitution; and (2) that the state court deciding a question, which insofar as it is a federal question, was decided by the Supreme Court of Wisconsin exactly in accordance with the applicable decisions of this court.

ARGUMENT.

I. The Decision Was Based Upon An Independent Ground of State Law.

The appellant ignores the fact that in the instant case the respondent raised the question of the validity of the tax under the Wisconsin Constitution.

In its appeal from the decision of the Tax Commission to the Circuit Court of Dane County the respondent contended among other things as follows; Record p. 18, f. 107:

“(1) Section 3 of Chapter 505 of the Wisconsin Session Laws of 1935 and amendments thereto is unconstitutional under Section 1 of the Fourteenth Amendment of the Constitution of the United States of America and Article I, Section 1 of the Constitution of the State of Wisconsin, in that it deprives the Minnesota Mining and Manufacturing Company and/or its stockholders of property without due process of

law because it attempts to levy an excise tax upon the privilege of paying and receiving dividends out of income derived from property located and business transacted in Wisconsin, when no act in connection with the payment and receipt of such dividends took place within the State of Wisconsin, except the receipt of such dividends as were paid to Wisconsin stockholders."

Record, p. 19, f. 108:

"That even if said law might be held to be constitutional from a jurisdictional standpoint insofar as it levies a tax upon dividends of foreign corporations paid to and received by Wisconsin residents within the state and/or to dividends paid by Wisconsin corporations, said act so applied would be contrary to Section 1 of the Fourteenth Amendment of the Constitution of the United States of America and Article VIII, Section 1, of the Constitution of the State of Wisconsin, since it would be a denial of equal protection of the laws to residents of Wisconsin and as to Wisconsin corporations it would not be uniform and would contain unreasonable exemptions."

Record, p. 21, f. 110:

"(3) That said Section 3 of Chapter 305 of the Wisconsin Session Laws of 1935 and amendments thereto is unconstitutional under Section 1 of the Fourteenth Amendment to the Constitution of the United States of America and Article I, Section 1, of the Constitution of the State of Wisconsin, in that it deprives the Minnesota Mining and Manufacturing Company of liberty and property without process of law, in that it requires it to file returns, keep detailed figures and accounts, to collect the tax by making deductions from dividends paid and to perform numerous other acts within the State of Minnesota. That the

State of Wisconsin has no jurisdiction to require the Minnesota Mining and Manufacturing Company to do such acts within the State of Minnesota in order to assist it in collecting said tax levied by said section and the amendments thereto."

In the case of *J. C. Penney Company v. Wisconsin Tax Commission*, 289 N. W. 677, 679, on the authority of which the instant case was decided, the Supreme Court of Wisconsin stated:

"The plaintiff contends that this law as applied to a foreign corporation doing business as plaintiff does business is invalid for the reason that it deprives the plaintiff of its property without due process of law in contravention of the Fourteenth Amendment to the constitution of the United States, U. S. C. A., and Art. VIII, sec. 1, of the constitution of the state of Wisconsin. * * *"

The fact that the provisions of the state and federal constitutions may be similar does not justify this court in disturbing a judgment of a state court which adequately rests its application upon the provisions of its own constitution. That the state court may have been influenced by the decisions or reasoning of this court makes no difference. The judgment of the state court upon its constitution remains a judgment which this court is without jurisdiction to review; it would be immaterial whether in the instant case the tax was repugnant to or consistent with the Federal Constitution if repugnant to the Wisconsin Constitution. If the judgment of the Supreme Court of Wisconsin is that the tax violated the Wisconsin Constitution it should stand. Nowhere in its decision in *J. C.*

Penney Company v. Wisconsin Tax Commission, 289 N. W. 677, does the Supreme Court of Wisconsin affirmatively state it is holding the tax invalid because it violates the due process clause of the Federal Constitution.

In *Lynch v. Pierson* (1934), 293 U. S. 52, 55 S. Ct. 16, there was involved a validity of including income from real property in Ohio as part of the income of a resident of New York in computing her income tax return, and the Court stated (p. 53):

“* * * The relator sought review by the Supreme Court of New York, invoking rights under the Constitution and laws of the state of New York and under the Fourteenth Amendment of the Constitution of the United States. The Appellate Division of the Supreme Court, Third Department, annulled the determination of the state tax commission, *Pierson v. Lynch*, 237 App. Div. 763, 263 N. Y. S. 250. That court, while citing decisions of this Court under the Fourteenth Amendment, did not state that its decision rested upon the application of the Constitution of the United States. The Court of Appeals of the state affirmed the order of the Appellate Division, but without opinion (263 N. Y. 533, 189 N. E. 684), and the grounds of its decision are left to conjecture. It may be surmised, from the quotations in its opinion, that the Appellate Division intended to rest its decision upon a determination of the application of the Fourteenth Amendment, and that the affirmance by the Court of Appeals went upon the same ground, and not upon the nonfederal ground of the application of the Constitution and laws of the state. But jurisdiction cannot be founded upon surmise. Nor can claim of jurisdiction be sustained by reference to briefs and statements which are not part of the record.

"It is essential to the jurisdiction of this Court in reviewing a decision of a court of a state that it must appear affirmatively from the record, not only that a federal question was presented for decision to the highest court of the state having jurisdiction, but that its decision of the federal question was necessary to the determination of the cause, and that it was actually decided or that the judgment as rendered could not have been given without deciding it. * * *"

There were similar holdings in *Honeyman v. Hanan*, (1937), 300 U. S. 14, 57 S. Ct. 350, and *City of New York v. Central Savings Bank in the City of New York*, (1939), 306 U. S. 661, 59 S. Ct. 790.

Since the Supreme Court of Wisconsin has not affirmatively determined the instant case under the due process clause of the Federal Constitution and the court had before it precisely the same question under the State Constitution and determined against the validity of the statute in question, there is nothing for this court to do in any event but affirm the judgment. *State of Minnesota v. National Tea Company*, (1940), 60 S. Ct. 676. The state ground of decision was independent and controlling and review by this court would be moot, and no proper occasion for certiorari is presented.

II. The Federal Question Was Decided by the Supreme Court of Wisconsin in Accord With the Applicable Decisions of this Court.

Even if the decisions below were not based upon an independent ground of state law, the federal question involved here has been settled by the Supreme Court of Wisconsin in accord with the applicable decisions of this court.

In *State ex rel. Froedtert Grain and Malting Company, Inc., v. Tax Commission*, (1936), 221 Wis. 225, 265 N. W. 672, 267 N. W. 52, 104 A. L. R. 1478, the Supreme Court of Wisconsin was passing on the validity of an excise tax imposed upon the stockholders of a domestic corporation for declaring and paying a dividend within the state of Wisconsin, and what it said in reference to the stockholders of a foreign corporation was mere dicta.

In the *Froedtert* case the court in its dicta as to foreign corporations and its stockholders, therein disregarded the corporate entity, and laid down rules not in accord with the decisions of this court in *Rhode Island Hospital Company v. Doughton*, (1926), 270 U. S. 69, 46 S. Ct. 256, *First National Bank of Boston v. Maine*, (1932), 284 U. S. 312, 52 S. Ct. 174, and *Klein v. Board of Supervisors*, (1930), 282 U. S. 19, 51 S. Ct. 15.

In the *Froedtert* case the court in its dicta as to foreign corporations and its stockholders laid down rules as to constructive situs not in accord with the decisions of this court in *Connecticut General Life Insurance Company v. Johnson*, (1938), 303 U. S. 77, 58 S. Ct. 436, *Newport Company v. Wisconsin Tax Commission*, (1935), 219 Wis. 293, 261 N. W. 884 (certiorari denied by United States Su-

preme Court, 56 S. Ct. 598), *Rhode Island Hospital Trust Company v. Doughton*, (1926), 270 U. S. 69, 46 S. Ct. 256, *Peoples Tobacco Company v. American Tobacco Company*, (1918), 246 U. S. 79, 38 S. Ct. 233, and *Cannon Manufacturing Company v. Cudahy Packing Company*, (1925), 267 U. S. 333, 45 S. Ct. 250.

In the *Froedtert* case the court in its dicta as to foreign corporations and its stockholders laid down rules on the theory of devolution of income not in accord with decisions of this court in *Louisville Gas & Electric Company v. Coleman*, (1928), 277 U. S. 32, 48 S. Ct. 423, *Hopkins v. Southern California Tel. Company*, (1928), 275 U. S. 393, 48 S. Ct. 180, and *Concordia Fire Insurance Company v. Illinois*, (1934), 292 U. S. 535, 54 S. Ct. 830.

In the *Froedtert* case the court laid down rules as to the immateriality of upon whom the tax falls not being in accord with the decision of this court in *Heiner v. Donnan*, (1932), 285 U. S. 312, 52 S. Ct. 358, and *Schlesinger v. Wisconsin*, (1926), 270 U. S. 230, 46 S. Ct. 260.

In the *Froedtert* case, in its dicta as to foreign corporations and its stockholders as to a trust in favor of the state upon income lawfully removed from Wisconsin for the payment of taxes, the court laid down rules not in accord with the decision of this court in *Connecticut Life Insurance Company v. Johnson*, (1938), 303 U. S. 77, 58 S. Ct. 436.

In the case of *J. C. Penney Company v. Wisconsin Tax Commission*, 289 N. W. 677, and in the instant case, when called upon to squarely pass upon the power of the State of Wisconsin to levy an excise tax upon the act of declar-

ing a dividend by a foreign corporation to its stockholders in a foreign state, after a re-consideration of the foregoing questions, the Supreme Court of Wisconsin modified its position in the case of *State ex rel. Froedtert G. & M. Company, Inc. v. Tax Commission*, (1936), 221 Wis. 225, 265 N. W. 672, 267 N. W. 52, 104 A. L. R. 1478, so as to be in accord with the applicable decisions of this court.

In the case of *J. C. Penney Company v. Wisconsin Tax Commission*, 289 N. W. 677, (680), the Supreme Court of Wisconsin stated:

“* * * It is agreed on all sides that the tax in question is an excise tax and this court has so held in the Froedtert case. * * *”

In the instant case the Minnesota Mining and Manufacturing Company exercised the right and privilege to declare dividends in Minnesota to its stockholders who exercised their contractual rights to receive dividends by reason of its charter and the laws of the state of its incorporation, Delaware. Wisconsin had the power only to impose an excise tax upon a privilege granted by it or a power exercised within its borders.

In *St. Louis Cotton Compress Company v. Arkansas*, (1922), 260 U. S. 346, 43 S. Ct. 125, where property insured was within state and foreign corporation was authorized to do business therein, in a suit to collect tax on the insurance, the court stated at p. 349 of the U. S. Reporter:

“* * * This case is stronger than that of Allgeyer in that here no act was done within the State, * * * It is true that the State may regulate the activities

of foreign corporations within the State but it cannot regulate or interfere with what they do outside. * * *

In *New York, Lake Erie and Western Railroad Company v. Pennsylvania*, (1894), 153 U. S. 628, 14 S. Ct. 952, there was involved a Pennsylvania statute which attempted to impose upon a foreign corporation the duty, when paying interest upon bonds held by residents of Pennsylvania of deducting a certain portion of the interest and paying the same into the state treasury. The interest on the bonds was by their terms payable in the State of New York.

As to the power of the state to make such requirement, the court said at p. 646 of the U. S. Reporter:

"The New York, Lake Erie and Western Railroad Company is not subject to regulations established by Pennsylvania in respect to the mode in which it shall transact its business in the State of New York. The money in the hands of the company in New York to be applied by it in the payment of interest, which by the terms of the contract is payable in New York and not elsewhere, is property beyond the jurisdiction of Pennsylvania, and Pennsylvania is without power to say how the corporation holding such money, in another state, shall apply it, and to inflict a penalty upon it for not applying it as directed by its statutes; especially may not Pennsylvania, directly or indirectly, interpose between the corporation and its creditors, and forbid it to perform its contract with creditors according to its terms and according to the law of the place of performance."

In *Connecticut General Life Insurance Company v. Johnson*, (1938), 303 U. S. 77, 58 S. Ct. 436, the United States Supreme Court stated:

"* * * Hence it is that a state which controls the property and activities within its boundaries of a foreign corporation admitted to do business there may tax them. But the due process clause denies to the state power to tax or regulate the corporation's property and activities elsewhere. * * * It follows that such a tax, otherwise unconstitutional, is not converted into a valid exaction merely because the corporation enjoys outside the state economic benefits from transactions within it, which the state might but does not tax, or because the state might tax the transactions which the corporation carries on outside the state if it were induced to carry them on within."

There are similar holdings in *Louisville & J. Ferry Company v. Kentucky*, (1903), 188 U. S. 385, 23 S. Ct. 463, *Compania General De Tabacos De Filipinas v. Collector*, (1927), 275 U. S. 87, 48 S. Ct. 100, *Farmers' Loan & Trust Company v. Minnesota*, (1930), 280 U. S. 204, 74 L. Ed. 271, 65 A. L. R. 1000, 50 S. Ct. 98, *James v. Dravo Contracting Company*, (1937), 302 U. S. 134, 58 S. Ct. 208, *Provident Savings Life Assurance Society v. Kentucky*, (1915), 239 U. S. 103, 36 S. Ct. 34, 1916 C. L. R. A. 572, *Rhode Island Hospital Trust Company v. Doughton*, (1926), 270 U. S. 69, 46 S. Ct. 256, and *Wachovia Bank & Trust Company v. Doughton*, (1926), 272 U. S. 567, 47 S. Ct. 202.

Since the Supreme Court of Wisconsin has decided the instant case in accord with the applicable decisions of this court, no proper occasion for certiorari is presented.

In the instant case the State of Wisconsin is seeking to impose an excise tax upon the Minnesota Mining and Manufacturing Company, a Delaware corporation, for the right and privilege of performing the act of declaring dividends

or upon its stockholders for the privilege of receiving dividends declared in the State of Minnesota. All of the cases of this court cited by the petitioner can be readily distinguished from the instant case.

In the case of *American Manufacturing Company v. St. Louis*, (1919), 250 U. S. 459, 63 L. ed. 1084, 39 S. Ct. 522, this court held that an excise tax upon the act of manufacturing within the City of St. Louis, measured by the total value of the goods manufactured, was valid, although the goods subsequently moved in interstate commerce. This is no authority for taxing an act performed without the taxing state. -

In the case of *Atlantic Lumber Company v. Commissioner of Corporations and Taxation*, (1936), 298 U. S. 553, 80 L. ed. 1328, 56 S. Ct. 887, this court sustained as valid an excise tax upon the privilege or act of doing an intra-state business in the State of Massachusetts measured by the fair value of the assets employed in Massachusetts to the total assets, less certain deductions. This is no authority for taxing acts performed outside of the State of Wisconsin.

In the case of *Shaffer v. Carter*, (1920), 252 U. S. 37, 64 L. Ed. 445, 40 S. Ct. 221, this court sustained a state income tax upon the act of earning an income in Oklahoma by a resident of Illinois. This is no authority for Wisconsin taxing and act performed by a foreign corporation in the State of Minnesota.

In the case of *Underwood Typewriter Company v. Chamberlain*, (1920) 254 U. S. 113, 65 L. Ed. 165, 41 S. Ct. 45, this court sustained as valid a state franchise tax upon a foreign corporation upon the act of earning an income in the State of Connecticut. Clearly this is no authority for Wisconsin having extra-territorial power to tax acts performed outside its borders.

The case of *Miller v. Milwaukee*, (1927), 272 U. S. 713, 71 L. Ed. 487, 47 S. Ct. 280, is cited in support of the proposition that the corporate entity can be pierced and disregarded. The court in this case was dealing with an attempt by the State of Wisconsin to tax dividends from Wisconsin corporations where the Wisconsin law exempted dividends from income tax if the corporation had paid a tax upon the income, and taxed the dividends if the income to the corporation was exempt—obviously an attempt to tax federal securities in violation of the Constitution of the United States. Judge Holmes stated:

"There is no doubt that in general a corporation is a nonconductor that cuts off connection between dividends to its stockholders and the corporate funds from which the dividends are paid. *Des Moines National Bank v. Fairweather*, 263 U. S. 103, 44 S. Ct. 23, 68 L. Ed. 191. * * * *"

See also: *Eisner v. Macomber*, (1920), 252 U. S. 189, 40 S. Ct. 189; *First National Bank of Boston v. Maine*, (1932), 284 U. S. 312, 52 S. Ct. 174; *Rhode Island Hospital Trust Company v. Doughton*, (1926), 270 U. S. 69, 46 S. Ct. 256; *Beidler, et al. v. South Carolina Tax Commission*, (1930), 282 U. S. 1, 51 S. Ct. 54; *Klein v. Board*

of Supervisors, (1930), 282 U. S. 19, 51 S. Ct. 15; *Owensboro National Bank v. Owensboro*, (1899), 173 U. S. 664, 19 S. Ct. 537; and *Estate of Shepard*, (1924), 184 Wis. 88, 197 N. W. 344; wherein this court has definitely taken the position that the corporate entity cannot be pierced.

The petitioner cites *Barnes v. The Railroads*, (1873) 17 Wall. (84 U. S.) 294, 21 L. Ed. 544, and *Railroad Company v. Collector*, (1879), X Otto (100 U. S.) 595, 25 L. Ed. 647, as authority for the view that the tax imposed by Section 3, Chapter 505 of the Wisconsin Session Laws of 1935, and amendments thereto, was laid upon the corporation and not upon the stockholders, and the petitioner concedes that in the cases of the *United States v. Railroad Company*, (1873), 17 Wall. (84 U. S.) 322, 21 L. Ed. 597, and *Stockdale v. Atlantic Insurance Company*, (1874), 20 Wall. (87 U. S.) 323, this court questioned such interpretation. Such view is not in accord with the following decisions of this court: *Home Savings Bank v. Des Moines*, (1907), 205 U. S. 503, 27 S. Ct. 571, *Merchants' & Manufacturers' National Bank of Pittsburgh v. Commonwealth of Pennsylvania*, (1897), 167 U. S. 461, 17 S. Ct. 829; *Des Moines National Bank v. Fairweather*, (1923), 263 U. S. 103, 44 S. Ct. 23; *United States v. Commissioners of Sinking Fund*, (1898), 169 U. S. 249; 18 S. Ct. 358; *Heiner v. Donnan*, (1932), 285 U. S. 312, 52 S. Ct. 358; and *First National Bank v. Chehalis*, (1897), 166 U. S. 440, 17 S. Ct. 629; and *Oliver v. Washington Mills*, (Mass.) (1865), 11 Allen 268.

The Federal Treasury Department, Bureau of Internal Revenue, I. T. 3002 XV-35-8264 (p. 4), held that the Wis-

consin privilege dividend tax is an excise tax imposed upon the stockholder receiving the dividend.

Assuming for the sake of argument, without conceding, that the instant tax was upon the corporation and not upon its stockholders, the cases cited are not in accord with the view of the petitioner that Wisconsin can tax the Minnesota Mining and Manufacturing Company for its acts performed in Minnesota.

CONCLUSION.

The Wisconsin court held that a tax assessed under Section 3, Chapter 505 of the Laws of 1935, as amended by Chapter 552 of the Laws of 1935, was invalid in the instant case as imposing a tax upon the Minnesota Mining and Manufacturing Company, a Delaware corporation, for the right and privilege of performing an act, to-wit: the declaration of a dividend in Minnesota.

The Wisconsin court called attention to the fact that it was considering the validity of this tax under the due process clause of the Wisconsin Constitution and the Federal Constitution. It does not affirmatively appear that this decision was not predicated upon an independent ground of state law adequate to maintain the judgment. Accordingly this court will not take jurisdiction.

Even were the Federal question controlling, the decision of the Wisconsin court is in harmony and accord with the applicable decisions of this court. There is no occasion for this court to reconsider its former rulings. It is respectfully submitted that the petition for certiorari should be denied.

Respectfully submitted,

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In the
Supreme Court of the United States

OCTOBER TERM, 1940.

Nos. 46, 47 and 48

STATE OF WISCONSIN and ELMER E. BARLOW, as
Commissioner of Taxation of the State of Wisconsin,

Petitioners,

vs.

J. C. PENNEY COMPANY, a Delaware Corporation. (No. 46)

STATE OF WISCONSIN and ELMER E. BARLOW, as
Commissioner of Taxation of the State of Wisconsin,

Petitioners,

vs.

F. W. WOOLWORTH COMPANY, a New York Corporation. (No. 47)

STATE OF WISCONSIN and ELMER E. BARLOW, as
Commissioner of Taxation of the State of Wisconsin,

Petitioners,

vs.

MINNESOTA MINING AND MANUFACTURING COMPANY, a Delaware Corporation.

(No. 48)

BRIEF OF PETITIONERS

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In the
Supreme Court of the United States

OCTOBER TERM, 1940

Nos. 46, 47 and 48

STATE OF WISCONSIN and ELMER E. BARLOW, as
Commissioner of Taxation of the State of Wisconsin,

Petitioners,

vs.

J. C. PENNEY COMPANY, a Delaware Corporation. (No. 46)

STATE OF WISCONSIN and ELMER E. BARLOW, as
Commissioner of Taxation of the State of Wisconsin,

Petitioners,

vs.

F. W. WOOLWORTH COMPANY, a New York Corporation. (No. 47)

STATE OF WISCONSIN and ELMER E. BARLOW, as
Commissioner of Taxation of the State of Wisconsin,

Petitioners,

vs.

MINNESOTA MINING AND MANUFACTURING COMPANY, a Delaware Corporation.

(No. 48)

BRIEF OF PETITIONERS

The petitioners are the same in the above entitled cases and this brief is submitted on their behalf as a joint brief for all three cases.

Although the detailed facts are different in each case by virtue of there being separate respondents and the conduct by each of its respective individual business and affairs, the same ultimate factual situation exists in all of them. The differences in detailed facts are not material

here. The Supreme Court of Wisconsin heard and decided the cases at the same time and upon the same grounds, its decision in the *J. C. Penney Company* case, number 46 here, expressly controlling the judgment entered in each of the cases. The questions of law here presented are likewise identical.

The facts relating to each case will be hereinafter separately stated. In all other respects the contents hereof, except as otherwise specifically stated, apply equally to all three cases.

I.

THE OPINIONS OF THE COURT BELOW.

The majority and dissenting opinions of the Supreme Court of Wisconsin, filed January 16, 1940, in the three cases are reported respectively in Vol. 233 Wis. (Advance Sheets, No. 3) pp. 286, 305 and 306, and in 289 N. W. 676, 685 and 686 (No. 46, R. 77; No. 47, R. 78; No. 48, R. 95).

II.

JURISDICTION.

1. The jurisdiction of this Court is invoked under the provisions of Section 237b of the Federal Judicial Code (28 U. S. C. A. 344 (b)), and petitioners rely upon Paragraph 5 (a) of Rule 38 of the Rules of this Court.
2. The writs of certiorari in these cases were issued to review the separate judgments of the Supreme Court of Wisconsin in the three cases. The judgment of the Supreme Court of Wisconsin was entered in each case

on January 16, 1940 (No. 46, R. 76; No. 47, R. 77; No. 48, R. 94).

3. Review is here sought by the writs of certiorari in these cases of three separate judgments entered by the Supreme Court of the State of Wisconsin upon appeals to it in three separate proceedings in the state courts of Wisconsin respecting the validity of taxes assessed by the State of Wisconsin against the respective respondents separately. The respondent in each case contends and in its pleading throughout the proceedings has averred that insofar as Section 3 of Chapter 505, Laws of Wisconsin, 1935, as amended by Chapter 552, Laws of Wisconsin, 1935, imposes a tax upon the respondent under the facts set out in the record, said Section 3 of Chapter 505, Laws of Wisconsin, 1935, as amended, imposes a tax beyond the taxing jurisdiction of the State of Wisconsin, and that, therefore, the imposition of the tax against the respondent by the assessment involved, which was made pursuant to the provisions of said Section 3 of Chapter 505, Laws of Wisconsin, 1935, as amended, constitutes a deprivation of the respondent's property without due process of law, contrary to the provisions of the Fourteenth Amendment to the Constitution of the United States. Separate judgments in the state courts of Wisconsin affirming the taxes assessed by the State of Wisconsin, pursuant to said Section 3 of Chapter 505, Laws of Wisconsin, 1935, as amended, against the respective respondents were reversed on separate appeals by the Supreme Court of Wisconsin on the constitutional objections thus asserted by the respondents. It is these

judgments of the Supreme Court of Wisconsin that are here under review.

4. Reference is also made to the separate petitions for and briefs in support of the granting of the writs of certiorari in these cases, for a more comprehensive jurisdictional statement.

5. The briefs in opposition to the granting of the writs in two of these cases urged that there is no indication in the decision of the Supreme Court of Wisconsin that it was rested on a federal question. Such position is wholly untenable in view of the fact that the Supreme Court of Wisconsin specifically rested its decision upon the federal question. Attention is directed to the statement in the opinion (No. 46, R. 77, 86), reported *J. C. Penny Company v. Tax Commission*, (1940) 233 Wis. (adv. sheets) 286, 297, 289 N. W. 677, 682, as follows:

*** * * While there is much to be said for the proposition that a foreign corporation admitted to do business in Wisconsin should be subject to the same burdens and liabilities as is a similar Wisconsin corporation, we must in the determination of this question conform to the law as laid down by the Supreme Court of the United States. * * *

"We are strongly urged to affirm the judgment in this case because the state treasury is dependent upon the maintenance of the right of the state to tax dividends of foreign corporations to the extent that such dividends are derived from earnings within the state. The matter of financial exigencies of the state, however, afford no justification for the ignoring of a rule of law laid down by the United States Supreme Court. The state must find its revenues within the field within which its taxing power may be exerted as prescribed by the constitution and laws of the United States." (Emphasis supplied)

III.

STATEMENT OF THE CASE.

The controversy in these cases is as to the validity of taxes assessed by the State of Wisconsin against the respective respondent foreign corporations, doing business in the State of Wisconsin pursuant to the laws thereof. The taxes involved were assessed pursuant to the provisions of Section 3 of Chapter 505, Laws of Wisconsin, 1935, as amended, which imposes a tax upon corporate dividends paid out of income derived from property located or business transacted in the State of Wisconsin.

A copy of said Section 3 of Chapter 505, Laws of Wisconsin, 1935 (effective upon its publication on September 26, 1935) and as amended by Chapter 552, Laws of Wisconsin, 1935 (effective upon its publication on October 8, 1935) is printed as an Appendix to this brief.

Said taxing statute is a special act and imposes a tax on "all corporations (foreign and local)" "equal to two and one-half per centum of the amount" of dividends declared and paid out of income derived from property located and business transacted in the State of Wisconsin. It provides that such tax shall be deducted and withheld by the corporation from the dividends paid to both residents and nonresidents of Wisconsin and that the corporation is made liable for the tax and the payment thereof.

In Subsection (4) thereof it is specifically provided that as to "corporations doing business within and without the state of Wisconsin, such tax shall apply only to dividends declared and paid out of income derived from business transacted and property located within the state

of Wisconsin" and that the amount of income of such a corporation attributable to the State of Wisconsin shall be computed in the same manner as is provided in Chapter 71 of the Wisconsin Statutes (the general income tax law) for the determination of the income of such type of corporation allocable as Wisconsin income.

The detailed facts in each case are not in dispute and are contained in separate records certified to this Court. No issue as to the facts was raised or presented in the cases in the state courts of Wisconsin and none now exists or is here presented. Likewise, no question has been raised, and none exists, as to the correctness of the procedure in the assessment of the taxes involved or in the review of the assessments in the state court proceedings. Consequently, no procedural matters are involved herein. The only controversy at issue involved in the proceedings in the state courts and presented to and decided by the Supreme Court of Wisconsin in rendering the judgments under review is whether the Fourteenth Amendment to the Constitution of the United States precludes the State of Wisconsin from imposing the tax, as provided in Section 3 of Chapter 505, Laws of Wisconsin, 1935, as amended, upon the respective respondent foreign corporations under the facts set out in the records. This is solely a question of law and purely a federal question. The judgments of the Supreme Court of Wisconsin under review are based solely on its decision of that question. The petitioners here contend that its decision upon said federal question is erroneous and should be reversed.

Separate assessment of the taxes involved in each case was made against each respondent (No. 46, R. 43, 49; No. 47, R. 50-52; No. 48, R. 46). Each respondent

duly filed its objections to said assessment and duly applied for a hearing thereon in the manner and as provided by the Wisconsin statutes (No. 46, R. 51; No. 47, R. 53-54; No. 48, R. 48). Each respondent herein made the claim that Section 3 of Chapter 505, Laws of Wisconsin, 1935, as amended, as applied to it under the existing facts purports to impose a tax beyond the taxing jurisdiction of the State of Wisconsin and, therefore, is invalid as violative of the due process provision of the Fourteenth Amendment to the Constitution of the United States. The matters were heard separately by the Wisconsin Tax Commission and it entered a separate decision and order sustaining the assessment in each case (No. 46, R. 19; No. 47, R. 22; No. 48, R. 28). Separate appeals therefrom, in accordance with and as provided by the Wisconsin statutes, were taken to the Circuit Court for Dane County, Wisconsin, by each of the respondents, and in the pleadings upon such statutory appeals each respondent renewed its objection to the tax upon said constitutional grounds.

The Circuit Court for Dane County, Wisconsin, upheld the validity of the tax in each case upon the authority of *State ex rel. Froedtert G. & M. Co., Inc. v. Tax Commission*, (1936) 221 Wis. 225, 265 N. W. 672, 267 N. W. 52, 104 A. L. R. 1478, in which case the Supreme Court of the State of Wisconsin in a declaratory judgment in 1936 had expressly sustained the validity of said tax law as applied to both foreign and domestic corporations over the objection that it contravened the due process of law provisions of the Fourteenth Amendment to the Constitution of the United States (No. 46, R. 67; No. 47, R. 67; No. 48, R. 83), and entered separate judgments on June

10, 1939 in each case sustaining the assessment there involved (No. 46, R. 69; No. 47, R. 68; No. 48, R. 85).

Upon separate appeals from said Circuit Court of Dane County, Wisconsin, by the respective respondents the Supreme Court of Wisconsin sustained the contention of the respondents and held that Section 3 of Chapter 505, Laws of Wisconsin, 1935, as amended, was invalid insofar as it purported to impose a tax upon the devolution of dividends of the respondent corporations to their respective stockholders. The Supreme Court of the State of Wisconsin expressly overruled its decision in *State ex rel. Froedtert G. & M. Co., Inc. v. Tax Commission*, (1936) 221 Wis. 225, 265 N. W. 672, 267 N. W. 52, 104 A. L. R. 1478, and did so expressly upon the authority of *Connecticut General Life Ins. Co. v. Johnson*, (1938) 303 U. S. 77, 82 L. Ed. 673, 58 S. Ct. 436 (No. 46, R. 77; No. 47, R. 78; No. 48, R. 95). It is these decisions and judgments of the Supreme Court of the State of Wisconsin that are here under review.

IV.

SUMMARY OF FACTS.

As before stated, the detailed facts in each case are not in dispute and are contained in the separate records certified to this Court and printed separately for each case. Following are separate summaries of such facts in each case as are material to the questions here involved. The page references to the record contained in each summary are to the page of the printed record in the particular case to which the summary is applicable.

1. No. 46, J. C. Penney Company Case

The J. C. Penney Company is a Delaware corporation, having its statutory office at Wilmington, Delaware (R. 26). It is engaged in the business of operating a nation wide chain of retail department stores, approximately 1500 in number. It is licensed to do business in the State of Wisconsin but has no executive office of any kind located within the State (R. 27). During the year 1934 it operated 47 stores in Wisconsin. In 1935 and 1936 it operated 48 stores in Wisconsin (R. 28). During the year 1934, the corporation had a total net income computed on the Wisconsin tax basis of \$16,022,607, and in 1935, a total net income of \$15,223,478. Applying the formula of the Wisconsin income tax statute (Section 71.02, Wisconsin Statutes (1935)) \$562,331.00 of the 1934 income was allocable to Wisconsin business and \$587,000.00 of the 1935 income was allocable to Wisconsin business (R. 46).

On December 31, 1935, the J. C. Penney Company declared a dividend of \$2.25 per share, making total dividend payments of \$5,555,214.00 (R. 45).

In 1936, it declared and paid the following dividends (R. 45):

Date Paid	Amount per share	Total Amount Paid to Stockholders
3/31/36	\$.75	\$ 1,851,738.00
6/30/36	.75	1,851,738.00
9/30/36	1.00	2,468,984.00
12/15/36	4.75	11,727,674.00

The J. C. Penney Company operates its business in the following manner: the total proceeds from sales of

goods in all its stores, including Wisconsin stores, are deposited in local banks. From such deposits payments are made by the local store managers for payrolls, rents, advertising and other local expenses. The remainder not needed for such expenses is ultimately transferred to the treasurer's office in New York City and deposited in New York banks to the credit of the corporation. No separate account is kept of the funds from the various States and moneys after leaving the local banks completely lose their identity with respect to being derived from a particular source. From the funds deposited in New York, salaries, general overhead expenses in New York and other offices, taxes and dividends are paid. Checks are also drawn thereon in payment for all merchandise purchased and shipped to the various stores (R. 29). All of the stockbooks, minute books and secretary's records of the corporation are kept in the State of New York, except that a duplicate stock ledger is kept in Delaware as required by that State. All transfers of shares of stock are made by the New York transfer agent of the corporation; all directors and stockholders' meetings are held in the State of New York and all dividends are declared at such meetings (R. 30). The actual payment of dividends is effected by checks drawn upon the accounts of the corporation in New York, payable to the stockholders of record upon each dividend record date. Such checks are mailed to the postoffice address of each stockholder as the same appears in the record. No act in connection with the payment of dividends was performed within the State of Wisconsin and no act in connection with the receipt of such dividend was performed in the State of Wisconsin except that certain stockholders lived and received

their mail in Wisconsin (R. 32). As of the date of payment of the December 31, 1935 dividend, 391 stockholders were residents of the State of Wisconsin as against a total of 12,385 stockholders. With respect to the dividend paid on December 15, 1936, there were 405 Wisconsin stockholders as against a total of 13,281 stockholders (R. 51).

Pursuant to a notice of an additional assessment dated July 16, 1937, in accordance with the procedural provisions of the Wisconsin statutes, the Wisconsin Tax Commission assessed a tax against the said J. C. Penney Company, a corporation, pursuant to the provisions of Section 3 of Chapter 505, Laws of Wisconsin of 1935, as amended, which was ultimately adjusted at the sum of \$23,586.79 (R. 43 and 49). The corporation duly filed its objections to said assessment and applied for a hearing thereon within the period, in the manner and as provided by the Wisconsin Statutes in such instances (R. 51). Thereupon the matter was heard by the Wisconsin Tax Commission and on July 21, 1938 it entered a decision and order sustaining the assessment of said taxes in the amount of \$23,586.79 (R. 19).

The assessment of said taxes and the decision and order of the Wisconsin Tax Commission sustaining the same, upon the application of the corporation and pursuant to the provisions therefor in the Wisconsin Statutes, were duly reviewed by the Circuit Court for Dane County, Wisconsin, and on June 10, 1939 judgment was entered therein confirming the same (R. 69). Upon appeal therefrom by the J. C. Penney Company in accordance with the Wisconsin Statutes, the Supreme Court of the State of Wisconsin on January 16, 1940 rendered its

decision and judgment reversing the judgment of said Circuit Court and holding that said taxes so assessed, and the provisions of Section 3 of Chapter 505, Laws of Wisconsin of 1935, as amended, as applied to said J. C. Penney Company, under the facts as stated, were invalid as depriving the said J. C. Penney Company, a corporation, of its property without due process of law in violation of the Fourteenth Amendment to the Constitution of the United States (R. 77). It is this decision and judgment of the Supreme Court of the State of Wisconsin that is under review in this case.

2. *No. 47, F. W. Woolworth Company Case*

The F. W. Woolworth Company is a New York corporation, having its statutory office at Watertown, New York, and its principal business office in the Woolworth Building, New York City, New York. During the years involved it was engaged in the business of operating a chain of retail mercantile stores in 29 States, the District of Columbia and Cuba, and owns all or a part of the stock in other corporations engaged in the same business in the other 19 States, Canada, Great Britain and Germany (R. 44). It is licensed to do business in the State of Wisconsin but has no executive office of any kind located within the State (R. 4). During the years 1934, 1935 and 1936 it operated about 55 stores in Wisconsin (R. 39). Computed on the Wisconsin tax basis, the corporation had a total net income during the year 1934 of \$27,808,579.19, in 1935 a total net income of \$24,606,991.08, and in 1936 a total net income of \$25,102,593.64 (R. 4). Applying the formula of the Wisconsin income tax statute (Section 71.02, Wisconsin Statutes 1935) \$555,538.44

of the 1934 net income was allocable to Wisconsin business, \$579,547.66 of the 1935 net income was allocable to Wisconsin business, and \$576,522.38 of the 1936 net income was allocable to Wisconsin business (R. 4).

On each of the following dates, to-wit: December 2, 1935, March 2, 1936, June 1, 1936, September 1, 1936, December 1, 1936, and March 1, 1937 the F. W. Woolworth Company declared a dividend on all its outstanding stock, and on each of said dates paid a total dividend of \$5,850,000. Of each of said dividends \$5,822,167.80 was paid on shares outstanding in the hands of stockholders, and the balance of \$27,832.20 of each dividend was paid upon shares outstanding but held in the Company's treasury (R. 5). Each of these dividends was declared by the board of directors at meetings held in New York City, New York (R. 34).

The F. W. Woolworth Company operates its business in the following manner: from the proceeds from sales of goods in each store, including Wisconsin stores, the local manager pays the local expenses such as payrolls and small supplies. He deposits the balance above these requirements in a local bank. Periodically the Minneapolis district office draws on this bank account and when so drawn the moneys are combined at the Minneapolis office with moneys similarly drawn from banks from other States in the Minneapolis district. No attempt is made to keep the money separate from the different States. The Minneapolis office uses the moneys so received to pay merchandise bills, alteration, and other expenses (R.35). A separate accounting for each store is kept at the Minneapolis office (R. 41). From time to time the district office accumulates funds above these re-

quirements which are transmitted to the main office in New York City and deposited in New York banks to the credit of the corporation (R. 35). From the funds deposited in New York, salaries, general overhead expenses in New York and other offices, taxes and dividends are paid (R. 36). All of the stockbooks, minute books and secretary's records of the corporation are kept in the State of New York. All transfers of shares of stock are made by the New York transfer agent of the corporation; all directors and stockholders' meetings are held in the State of New York (R. 36). All dividends are declared at such meetings (R. 34). The actual payment of dividends is effected by a check drawn upon the bank account of the corporation in New York, payable to its transfer agent, City Bank Farmers Trust Co. of New York City for the total amount of each dividend declared. The transfer agent then prepares checks payable to each stockholder of record which it mails in New York City to the postoffice address of each stockholder as the same appears in the record (R. 34). No act in connection with the payment of dividends was performed within the State of Wisconsin and no act in connection with the receipt of such dividend was performed in the State of Wisconsin except that certain stockholders lived and received their mail in Wisconsin (R. 34). As of the said dividend dates there were in excess of 50,000 stockholders of the company owning 9,703,613 shares of which not more than 470 were residents of the State of Wisconsin owning not more than 14,597 shares (R. 7).

Pursuant to a notice of an additional assessment dated July 16, 1937, in accordance with the procedural provisions of the Wisconsin statutes, the Wisconsin Tax

Commission assessed a tax against the said F. W. Woolworth Company, a corporation, pursuant to the provisions of Section 3 of Chapter 505, Laws of Wisconsin of 1935, as amended, which was ultimately adjusted at the sum of \$20,058.33 (R. 50-52). The corporation duly filed its objections to said assessment and applied for a hearing thereon within the period, in the manner and as provided by the Wisconsin Statutes in such instances (R. 53, 54). Thereupon the matter was heard by the Wisconsin Tax Commission and on December 19, 1938, it entered a decision and order sustaining the assessment of said taxes, as adjusted in the amount of \$20,058.33, exclusive of interest and penalties (R. 26).

The assessment of said taxes and the decision and order of the Wisconsin Tax Commission sustaining the same, upon the application of the corporation pursuant to the provisions therefor in the Wisconsin Statutes, were duly reviewed by the Circuit Court for Dane County, Wisconsin, and on June 10, 1939, judgment was entered therein confirming the same (R. 68). Upon appeal therefrom by the F. W. Woolworth Company in accordance with the Wisconsin Statutes, the Supreme Court of the State of Wisconsin on January 16, 1940, rendered its decision and judgment reversing the judgment of said Circuit Court and holding that said taxes so assessed, and the provisions of Section 3 of Chapter 505, Laws of Wisconsin of 1935, as amended, as applied to said F. W. Woolworth Company, under the facts as stated, were invalid as depriving the said F. W. Woolworth Company, a corporation, of its property without due process of law in violation of the Fourteenth Amendment to the Constitution of the United States, based upon the opinion filed and the decision of the

Supreme Court of Wisconsin in the case of *J. C. Penney Company, a foreign corporation, v. Wisconsin Tax Commission*, on the same date (R. 78). It is this decision and judgment of the Supreme Court of the State of Wisconsin that is here under review.

3. *No. 48, Minnesota Mining and Manufacturing Company Case*

The Minnesota Mining and Manufacturing Company is a Delaware corporation, having its statutory office at Wilmington, Delaware, and its principal business office in St. Paul, Minnesota (R. 5). During the years involved it was engaged in the manufacturing business, operated factories at Detroit, Michigan, Copley, Ohio, St. Paul, Minnesota and also a factory at Wausau, Wisconsin, manufacturing roofing granules (R. 64). It is qualified to do business in the State of Wisconsin under the laws thereof but has no executive office of any kind located within the State (R. 5). Computed on the Wisconsin tax basis, the corporation had a total net income during the year 1935 of \$1,764,460.30. Applying the formula of the Wisconsin income tax statute (Section 71.02, Wisconsin Statutes 1935) \$261,157.62 of the 1935 net income was allocable to Wisconsin business (R. 48).

The Minnesota Mining and Manufacturing Company paid dividends as follows (R. 48):

No. 1 January 2, 1936	\$ 215,909.83
No. 2 April 1, 1936	216,380.97
No. 3 July 1, 1936	288,278.00
No. 4 October 1, 1936	336,441.00
No. 5 December 22, 1936	624,819.00
 Total	 \$1,681,828.80

The dividends above shown as paid in April, July, October and December included dividends paid on treasury stock to the aggregate amount of \$1,866.25, but the amount shown above for the dividend paid in January does not include dividends paid on treasury stock on that date in the amount of \$371.25 (R. 67). All of said dividends were declared at meetings of the Board of Directors held in St. Paul, Minnesota (R. 43).

The products of the Wausau plant are shipped to Chicago and points west, and the sales thereof are made through the Company's branch office in Chicago, Illinois. Pricing and billing the customer is done at the St. Paul, Minnesota office. The customer remits directly to the St. Paul office and the proceeds are deposited in banks in St. Paul, Minnesota (R. 64), where they are co-mingled with funds from other factories and income from other sources. The funds in said bank are used to pay expenses, royalties and dividends (R. 65). Employees of the Wausau, Wisconsin plant are paid as follows: After the payroll is prepared and sent to the main office at St. Paul, checks are there drawn on a Wausau bank and sent to the Wausau plant manager for distribution. On the same day a deposit in the amount of the total payroll is sent by the main office to the Wausau bank to meet the payroll checks (R. 65). The method of payment of each of said dividends was that the Company drew one check on its bank account in St. Paul, Minnesota for the full amount of the dividend, including the amount paid on the treasury stock, payable to its transfer agent in St. Paul, Minnesota, which in turn paid the dividends therefrom to the individual stockholders and returned to the corporation the dividends declared and paid on the treasury

stock (R. 68). No act in connection with the payment of dividends was performed within the State of Wisconsin and no act in connection with the receipt of such dividend was performed in the State of Wisconsin except that certain stockholders lived and received their mail in Wisconsin (R. 8). As of January 1, 1936 there were 42 stockholders of the company owning 3,006 shares, who were residents of the State of Wisconsin, and on January 1, 1938 there were 44 stockholders owning 4,944 shares who were residents of the State of Wisconsin. The Company had 961,260 shares of common stock outstanding, which were owned in practically every State in the Union (R. 64).

Pursuant to a notice of an additional assessment dated August 13, 1937, in accordance with the procedural provisions of the Wisconsin Statutes, the Wisconsin Tax Commission assessed a tax against the said Minnesota Mining and Manufacturing Company, a corporation, pursuant to the provisions of Section 3 of Chapter 505, Laws of Wisconsin of 1935, as amended, which was ultimately adjusted at the sum of \$5,471.06 (R. 46). The corporation duly filed its objections to said assessment and applied for a hearing thereon within the period, in the manner and as provided by the Wisconsin Statutes in such instances (R. 48). Thereupon the matter was heard by the Wisconsin Tax Commission and on December 19, 1938 it entered a decision and order sustaining the assessment of said taxes, as adjusted in the amount of \$5,471.06, exclusive of interest and penalties (R. 74).

The assessment of said taxes and the decision and order of the Wisconsin Tax Commission sustaining the same, upon the application of the corporation pursuant to the

provisions therefor in the Wisconsin Statutes, were duly reviewed by the Circuit Court for Dane County, Wisconsin, and on June 10, 1939 judgment was entered therein confirming the same (R. 85). Upon appeal therefrom by the Minnesota Mining and Manufacturing Company in accordance with the Wisconsin Statutes, the Supreme Court of the State of Wisconsin on January 16, 1940 rendered its decision and judgment reversing the judgment of said Circuit Court and holding that said taxes so assessed, and the provisions of Section 3 of Chapter 505, Laws of Wisconsin of 1935, as amended, as applied to said Minnesota Mining and Manufacturing Company, under the facts as stated, were invalid as depriving the said Minnesota Mining and Manufacturing Company, a corporation, of its property without due process of law in violation of the Fourteenth Amendment to the Constitution of the United States, based upon the opinion filed and the decision of the Supreme Court of Wisconsin in the case of *J. C. Penney Company, a foreign corporation, v. Wisconsin Tax Commission*, on the same date (R. 95). It is this decision and judgment of the Supreme Court of the State of Wisconsin that is here under review.

V.

SPECIFICATION OF ERRORS.

1. The Supreme Court of Wisconsin erred in holding in each case that Section 3 of Chapter 505, Laws of Wisconsin, 1935, (as amended by Chapter 552, Laws of Wisconsin, 1935) as applied to the respective respondents, under the existing facts, imposed a tax beyond the taxing

jurisdiction of the State of Wisconsin and therefore is invalid as in conflict with the Fourteenth Amendment to the Constitution of the United States.

2. The Supreme Court of Wisconsin erroneously held in each case that the assessment of the taxes involved, pursuant to the provisions of Section 3 of Chapter 505, Laws of Wisconsin, 1935 (as amended by Chapter 552, Laws of Wisconsin, 1935) against the respective respondents, under the existing facts, constitutes a deprivation of property of the respondents without due process of law because beyond the taxing power of the State of Wisconsin and therefore is invalid as violative of the Fourteenth Amendment to the Constitution of the United States.

VI.

ARGUMENT

POINT A, In *State ex rel. Froedtert G. & M. Co., Inc. v. Tax Commission*, (1936) 221 Wis. 225, 265 N. W. 672, 267 N. W. 52, 104 A. L. R. 1478, the Supreme Court of Wisconsin construed Section 3 of Chapter 505, Laws of Wisconsin, 1935, as amended, as imposing a tax upon the devolution or transfer of dividends derived from the income of corporations arising out of corporate business transacted in this State or corporate property located in this State. The constitutionality of the tax was upheld as applied to domestic and foreign corporations against the objection that it contravened the Fourteenth Amendment to the Constitution of the United States in that it attempted to impose a tax beyond the taxing jurisdiction of the State.

POINT B. The Supreme Court of Wisconsin in the case of *State ex rel. Froedtert G. & M. Co., Inc. v. Tax Commission*, (1936) 221 Wis. 225, 265 N. W. 672, 267 N. W. 52, 104 A. L. R. 1478 correctly applied the Fourteenth Amendment to the United States Constitution, as that amendment is construed by this Court, in determining the constitutionality of Section 3 of Chapter 505, Laws of Wisconsin, 1935, as amended.

POINT C. The Wisconsin Supreme Court in the instant cases, while it adhered to the construction of Section 3 of Chapter 505, Laws of Wisconsin, 1935, as amended, laid down in the case of *State ex rel. Froedtert G. & M. Co., Inc. v. Tax Commission*, (1936) 221 Wis. 225, 265 N. W. 672, 267 N. W. 52, 104 A. L. R. 1478, erred in holding that the decision of this Court in *Connecticut General Life Ins. Co. v. Johnson*, (1938) 303 U. S. 77, 82 L. Ed. 673, 58 S. Ct. 436, required that the tax be invalidated as beyond the taxing jurisdiction of the State of Wisconsin under the Fourteenth Amendment to the United States Constitution.

POINT D. The declaration and payment of dividends outside of the State of Wisconsin by a foreign corporation does not itself constitute an event taxable by Wisconsin and the court below properly so held. Where the income distributed is derived from Wisconsin earnings, however, and thus forms the subject matter of the transfer, the State of Wisconsin acquires jurisdiction to tax the transfer.

Point A.

IN STATE EX REL. FROEDERT G. & M. CO., INC. v. TAX COMMISSION, (1936) 221 WIS. 225, 265 N. W. 672, 267 N. W. 52, 104 A. L. R. 1478, THE SUPREME COURT OF WISCONSIN CONSTRUED SECTION 3 OF CHAPTER 505, LAWS OF WISCONSIN, 1935, AS AMENDED, AS IMPOSING A TAX UPON THE DEVOLUTION OR TRANSFER OF DIVIDENDS DERIVED FROM THE INCOME OF CORPORATIONS ARISING OUT OF CORPORATE BUSINESS TRANSACTED IN THIS STATE OR CORPORATE PROPERTY LOCATED IN THIS STATE. THE CONSTITUTIONALITY OF THE TAX WAS UPHELD AS APPLIED TO DOMESTIC AND FOREIGN CORPORATIONS AGAINST THE OBJECTION THAT IT CONTRAVENED THE FOURTEENTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES IN THAT IT ATTEMPTED TO IMPOSE A TAX BEYOND THE TAXING JURISDICTION OF THE STATE.

The provisions of Section 3 of Chapter 505, Laws of Wisconsin, 1935 (as amended), the tax law involved in the present controversies, so far as here material, reads as follows:

“Privilege Dividend Tax. (1) For the privilege of declaring and receiving dividends, out of income derived from property located and business transacted in this state, there is hereby imposed a tax equal to two and one-half per centum of the amount of such dividends declared and paid by all corporations (foreign and local) after the passage and publication of this act and prior to July 1, 1937. Such tax shall be deducted and withheld from such dividends payable

to residents and nonresidents by the payor corporation.

"(2) Every corporation required to deduct and withhold any tax under this section shall, on or before the last day of the month following the payment of the dividend, make return thereof and pay the tax to the tax commission, reporting such tax on the forms to be prescribed by the tax commission."

(A copy of the entire law is printed as an Appendix to this brief.)

Shortly following the enactment thereof an original action was instituted in the Supreme Court of the State of Wisconsin by the Froedtert Grain & Malting Company, Inc. for the purpose of obtaining a declaratory judgment as to the constitutionality of the law. The decision of the Wisconsin Supreme Court in said proceeding is reported in *State ex rel. Froedtert G. & M. Co., Inc. v. Tax Commission*, (1936) 221 Wis. 225, 265 N. W. 672, 267 N. W. 52, 104 A. L. R. 1478. The court upheld the law in its entirety as against the constitutional objections urged, including the objection that the tax imposed thereby was without the taxing jurisdiction of the State and was, therefore, prohibited by the Fourteenth Amendment to the Constitution of the United States.

A motion for rehearing was made and in connection therewith the Court was urged to determine the constitutionality of the law as applied to foreign corporations. The Froedtert Grain & Malting Company was a Wisconsin corporation and there was nothing specifically said in the court's first opinion to indicate whether it considered the law constitutional as applied to foreign corporations. In its opinion on rehearing it was specifically held by the

Court that the law, as applied to foreign corporations, was valid and that it did not impose a tax without the taxing jurisdiction of the State of Wisconsin.

The basis of the holding in the case of *State ex rel. Froedtert G. & M. Co., Inc. v. Tax Commission*, (1936) 221 Wis. 225, 265 N. W. 672, 267 N. W. 52, 104 A. L. R. 1478, was as follows:

- (1) The law imposes a tax upon the devolution or transfer from a corporation to its stockholders of income earned in the State of Wisconsin;
- (2) The law rests upon the same constitutional basis as laws taxing the devolution of property by death and other comparable laws taxing transfers;
- (3) Corporate earnings in the State of Wisconsin are taxable in Wisconsin, and the law in question merely serves to impose such a tax.

We do not expect any disagreement with counsel for respondents as to what the case in question held, but to avoid any question as to the analysis we have made, we quote the following passages from the court's opinion (*State ex rel. Froedtert G. & M. Co., Inc. v. Tax Commission*, (1936) 221 Wis 225, 265 N. W. 672, 267 N. W. 52, 104 A. L. R. 1478):

*** * the word 'privilege,' as used in the statutes taxing privileges, is used as synonymous with right. * * * This court has so construed the word in the inheritance tax cases. * * * The tax is a privilege tax, or an excise tax, one form of which is a tax imposed on the transfer of property. The federal government in its stamp taxes, imposes a tax on the right to transfer property by deed; it formerly

imposed a tax on the right to transfer funds in banks by check; it imposes taxes on the transfer of property by inheritance or will. These taxes are best characterized as a tax on the transaction involved. The power of the state to impose excise taxes is under our system of dual sovereignty as broad as the power of the federal government. * * * (Pages 230-231)

"However the legislature may have regarded the tax, we have no difficulty in construing the statute as imposing an excise or privilege tax upon the transaction involved of transferring the dividends from the corporation to its stockholders." (Page 233)

"* * * But the tax is an excise tax, a tax on the transaction involved. It is an excise tax imposed on the devolution of income, derived from transaction of business within the state, which is confessedly a proper subject of taxation. It is as much subject to an excise tax as is an inheritance tax, and the supreme court of the United States recognizes such taxes as not violating the United States constitution.

"* * * It is to be noted that the tax imposed on the salaries of nonresidents involved in the *Travis Case*, *supra*, [*Travis v. Yale & Towne Mfg. Co.*, (1920) 252 U. S. 60, 64 L. Ed. 460, 40 S. Ct. 228] was held not to impose a personal liability upon the nonresident employee. The tax, except as to a feature not involved herein, was upheld as a sequestration at their source of payment of earnings properly taxable which is precisely and only what the instant statute does." (Page 235)

"From some things in the briefs on the motion for rehearing we fear that we failed to make our position entirely clear in the original opinion. Our position is that the tax is an excise tax on the transfer of earnings resulting from property located or business transacted within this state, and stands on the same

basis of constitutionality that a state inheritance tax stands; that the tax of the state of New York on stock transfers, upheld in *Hatch v. Reardon*, 204 U. S. 152, 27 Sup. Ct. 188, stood; that the state tax in New York on the transfer of property by deed upheld in *Keeney v. New York*, 222 U. S. 525, 32 Sup. Ct. 105, stood; and that the tax on salaries of nonresidents earned within the state, upheld in *Travis v. Yale & Towne Mfg. Co.*, 252 U. S. 60, 40 Sup. Ct. 228, stood. Earnings from property or transactions within the state are as much subject to a transfer tax as property within the state passing by inheritance or deed or other form of transfer, or salaries earned within the state. * * *." (Page 240)

"* * * The basis of the instant tax is the fact that the dividends result from earnings from property situated or business transacted within this state. Such earnings are a proper subject of taxation, and therefore a proper basis for an excise tax on the transfer of the dividends resulting therefrom.
* * * (Pages 241-242)

"* * * We perceive no more difficulty in taxing the transfer of dividends of foreign corporations attributable to business transacted or property situated within the state than in taxing such corporations on income so derived, and the validity of the latter form of taxation is established. The fact that the dividends involved are derived from earnings within the state gives them a constructive situs within the state. They are as readily collectible as is an income tax against a foreign corporation. Liability for payment of the tax is imposed upon the corporation. If such liability may be imposed there is no difficulty about collecting it, and there is no more difficulty about imposing the liability than existed in the *Travis Case, supra*, about imposing upon the employer liability for the income tax on salaries of nonresidents earned within the state." (Pages 245-246)

Point B.

THE SUPREME COURT OF WISCONSIN IN THE CASE OF STATE EX REL. FROEDERT G. & M. CO., INC. v. TAX COMMISSION, (1936) 221 WIS. 225, 265 N. W. 672, 267 N. W. 52, 104 A. L. R. 1478 CORRECTLY APPLIED THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION, AS THAT AMENDMENT IS CONSTRUED BY THIS COURT, IN DETERMINING THE CONSTITUTIONALITY OF SECTION 3 OF CHAPTER 505, LAWS OF WISCONSIN, 1935, AS AMENDED.

Since the Wisconsin Supreme Court in *State ex rel. Froedert G. & M. Co., Inc. v. Tax Commission*, (1936) 221 Wis. 225, 265 N. W. 672, 267 N. W. 52, 104 A. L. R. 1478 sustained the validity of Section 3 of Chapter 505, Laws of Wisconsin, 1935, as amended, upon the theory that its constitutionality was determined by the same principles as apply to a determination of the validity of inheritance or estate taxes, it becomes necessary to determine whether, on the basis of such an analogy, the tax can be sustained under the Fourteenth Amendment to the United States Constitution as interpreted by the decisions of this Court.

Had the Wisconsin Court in the present cases altered its position as to the construction of the law there would, of course, be no occasion for examining its constitutionality in the light of the analysis made in a prior decision. We shall show, however, in the next point to be made in our argument that the construction of the law has not been changed by the Wisconsin Court. Consequently it becomes appropriate to determine the constitutional ques-

tion in the light of the analysis made in the first decision and a logical development of the argument requires that the problem be handled on that basis.

The decisions of this Court establish the following propositions:

(1) "Death duties rest upon the principle that death is the 'generating source' from which the authority to impose such taxes takes its being, and 'it is the power to transmit or the transmission' or receipt of property by death which is the subject levied upon by all death duties."

Tyler v. United States, (1930) 281 U. S. 497, 502, 74 L. ed. 991, 50 S. Ct. 356;

New York Trust Company, et al. v. Eisner, (1921) 256 U. S. 345, 65 L. ed. 963, 41 S. Ct. 506;

Stebbins v. Riley, (1925) 268 U. S. 137, 69 L. ed. 884, 45 S. Ct. 424;

Snyder v. Bettman, (1903) 190 U. S. 249, 47 L. ed. 1035, 23 S. Ct. 803;

Knowlton v. Moore, (1900) 178 U. S. 41, 44 L. ed. 969, 20 S. Ct. 747.

(2) The power to impose transfer, succession or legacy taxes is not dependent for its existence upon the power to regulate the transmission of property by death or upon the granting of a privilege to transmit or to receive property by death.

Stebbins v. Riley, (1925) 268 U. S. 137, 69 L. ed. 884, 45 S. Ct. 424;

Snyder v. Bettman, (1903) 190 U. S. 249, 47 L. ed. 1035, 23 S. Ct. 803;

Knowlton v. Moore, (1900) 178 U. S. 41, 44 L. ed. 969, 20 S. Ct. 747.

(3) The power of a state to impose a transfer tax is not dependent upon the event of death in that state. None of the cases decided by the court places emphasis upon the place of that event. Neither does the power of a state to tax a transfer depend upon those acts necessary to effectuate the transfer taking place within the state's territorial jurisdiction and pursuant to its laws.

Graves v. Elliott, (1939) 307 U. S. 383, 83 L. ed. 1356, 59 S. Ct. 913;

Bullen v. Wisconsin, (1916) 240 U. S. 625, 60 L. ed. 830, 36 S. Ct. 473;

Cf. Estate of Bullen, (1910) 143 Wis. 512, 128 N. W. 109.

(4) If a state has jurisdiction to impose a tax upon property, it may impose a tax upon the devolution by death of such property.

Graves v. Elliott (1939) 307 U. S. 383, 83 L. ed. 1356, 59 S. Ct. 913;

Curry v. McCanless, (1939) 307 U. S. 357, 83 L. ed. 1339, 59 S. Ct. 900;

Rhode Island Hospital Trust Co. v. Doughton, (1926) 270 U. S. 69, 70 L. ed. 475, 46 S. Ct. 256;

Snyder v. Bettman, (1903) 190 U. S. 249, 47 L. ed. 1035, 23 S. Ct. 803.

(5) A state may tax the income of individuals and corporations derived from business transacted and property located in the state.

Underwood Typewriter Company v. Chamberlain, (1920) 254 U. S. 113, 65 L. ed. 165, 41 S. Ct. 45;

Travis v. Yale & Towne Mfg. Co., (1920) 252 U. S. 60, 64 L. ed. 460, 40 S. Ct. 228;

Shaffer v. Carter, (1920) 252 U. S. 37, 64 L. ed. 445, 40 S. Ct. 221;

United States Glue Company v. Oak Creek, (1918) 247 U. S. 321, 62 L. ed. 1135, 38 S. Ct. 499.

The application of the analogy drawn by the Wisconsin Supreme Court between the tax here in question and a tax upon transfers by death necessarily results, in view of the foregoing, in establishment of the following propositions:

- (a) The tax here in question is, as held by the Wisconsin Court, an excise upon the transfer of corporate earnings, which embraces the right to transmit and the right to receive.
- (b) The state may tax the transfer notwithstanding the fact that it does not grant the privilege to make the transfer and may not regulate it.
- (c) The fact that dividends may be declared and paid outside the state pursuant to the law of another state does not deprive the state of the power to impose the tax in question.
- (d) If jurisdiction to tax the thing transferred results in jurisdiction to tax the transfer, the State of Wisconsin may tax the devolution to corporate stockholders of corporate income earned in this State.

The analogy thus drawn between the tax here involved and transfer taxes upon the devolution of property by death, if the analogy is validly drawn, conclusively establishes the constitutionality of the tax law in question in the face of the jurisdictional objections that have

been raised against the law as it has been applied to the respondent corporations. It remains, therefore, to determine whether the Wisconsin Supreme Court in the case of *State ex rel. Froedtert G. & M. Co., Inc. v. Tax Commission*, (1936) 221 Wis. 225, 265 N. W. 672, 267 N. W. 52, 104 A. L. R. 1478 was justified in drawing the analogy. A consideration of this problem resolves itself into a consideration of two somewhat interrelated questions, as follows:

- (1) Is the devolution of income from a corporation to its stockholders a proper subject for the imposition of an excise tax?
- (2) Do the considerations which have been held to justify the imposition of an excise upon the transfer of property resulting from death justify as well the imposition of an excise upon the transfer of corporate income from a corporation to its stockholders?

We shall discuss these questions in order.

First. The Wisconsin Supreme Court held in *State ex rel. Froedtert G. & M. Co., Inc., v. Tax Commission*, (1936) 221 Wis. 225, 265 N. W. 672, 267 N. W. 52, 104 A. L. R. 1478 that the excise tax imposed by the law in question was a tax upon the exercise of rights, as distinguished from the exercise of privileges. In referring to the power of the State to levy excise taxes, and as authority for the imposition of an excise upon the transfer of corporate income from a corporation to its stockholders, the Court quoted the following passage from *Cooley, Constitutional Limitations* (7th ed.) p. 678:

“* * * ‘The power to impose taxes is one so unlimited in force and so searching in extent, that the courts scarcely venture to declare that it is subject to any restrictions whatever, except such as rest in the discretion of the authority which exercises it. It reaches to every trade or occupation; to every object of industry, use, or enjoyment; to every species of possession.’ * * *.”

State ex rel. Froedtert G. & M. Co., Inc. v. Tax Commission, (1936) 221 Wis. 225, 231-232, 265 N. W. 672, 267 N. W. 52, 104 A. L. R. 1478.

This Court has referred to the taxing power in the following language:

“* * * The power of taxation is a fundamental and imperious necessity of all government, not to be restricted by mere legal fictions. * * *.”

Tyler v. United States, (1930) 281 U. S. 497, 503, 74 L. ed. 991, 50 S. Ct. 356.

It has said that:

“* * * In our system of government the States have general dominion, and, saving as restricted by particular provisions of the Federal Constitution, complete dominion over all persons, property, and business transactions within their borders; they assume and perform the duty of preserving and protecting all such persons, property, and business, and, in consequence, have the power normally pertaining to governments to resort to all reasonable forms of taxation in order to defray the governmental expenses. Certainly they are not restricted to property taxation, nor to any particular form of excises. * * *.”

Shaffer v. Carter, (1920) 252 U. S. 37, 50, 64 L. ed. 445, 40 S. Ct. 221.

The Court has also said that:

“* * * Unless restrained by provisions of the Federal Constitution, the power of the State as to the mode, form, and extent of taxation is unlimited, where the subjects to which it applies are within her jurisdiction.”

State Tax on Foreign-Held Bonds, (1872) 15 Wall. 300, 319.

Again, it has been stated that:

“* * * We have had frequent occasion to consider questions of state taxation in the light of the Federal Constitution, and the scope and limits of National interference are well settled. There is no general supervision on the part of the Nation over state taxation, and in respect to the latter the State has, speaking generally, the freedom of a sovereign both as to objects and methods. * * *.”

Michigan Central Railroad Company v. Powers, (1906) 201 U. S. 245, 292-293, 50 L. ed. 744, 26 S. Ct. 459.

In a recent case the Court has had occasion to consider the nature of excise taxes and the subjects upon which they may be levied. In conformity with the view of the Wisconsin Court it is held that excises may be imposed upon the exercise of rights, as distinguished from privileges. It is held, moreover, that business is a legitimate subject of the taxing power and that the power to tax business comprehends the power to tax the activities and relations which inhere in the transaction of business.

Chas. C. Steward Mach. Co. v. Davis, (1937) 301 U. S. 548, 580, 581, 81 L. ed. 1279, 57 S. Ct. 883.

Within its territorial jurisdiction a state may select the modes and methods by which it will raise tax monies, subject only to those provisions of the Federal Constitution which restrain unwarranted exercise of the taxing power. No one can fairly argue that an excise upon the devolution of dividends is not an appropriate subject of taxation or that in and of itself the imposition of such an excise violates any provisions of the Federal Constitution. In fact such a transfer measures the fruits of corporate earnings transferred from a corporation to its members. And the transfer is fairly subject to ~~to~~ tax which has for its purpose the taxation of Wisconsin corporate earnings at the point they become subject to the enjoyment of those who conduct a corporate business for the purpose of acquiring and distributing such earnings among themselves.

Second. Taxation has been said by this Court to represent a means or method of defraying the cost of government and it is held to rest upon the obligation of one enjoying the protection of the laws to contribute his just share toward defraying the cost of that protection.

First Bank Stock Corp. v. Minnesota, (1937) 301 U. S. 234, 241, 81 L. ed. 1061, 57 S. Ct. 677.

And so it is that protection afforded by a government in the acquisition, preservation and enjoyment of property or of income or protection afforded during the pursuit of gainful occupations has been held to afford a legitimate basis for the imposition of a tax by the government affording the protection.

Curry v. McCanless, (1939) 307 U. S. 357, 83 L. ed. 1339, 59 S. Ct. 900;

Shaffer v. Carter, (1920) 252 U. S. 37, 64 L. ed. 445, 40 S. Ct. 221;

New York ex rel. Cohn v. Graves, (1937) 300 U. S. 308, 81 L. ed. 666, 57 S. Ct. 466;

Union Transit Co. v. Kentucky, (1905) 199 U. S. 194, 202, 50 L. ed. 150, 26 S. Ct. 36.

As we have heretofore stated, the power to impose a transfer tax upon the devolution of property by death has been held to exist in any case where the taxing power extended to the imposition of a tax upon the property so transferred. Thus, in protecting the acquisition and enjoyment of property and enforcing rights which are of themselves property, a state derives the power to tax the property so protected and it derives as well the power to tax its transfer by death. The protection afforded by a state to property is reasonably related to the transfer of the property at death, since without the protection there would be no property to transfer. The right to transmit, the transmission, and the right to receive as applied to the devolution of property by death would in each case be an empty form were it not for the protection afforded by the state to the subject transferred.

In the case of the transfer of corporate dividends the same basis for taxation exists that exists in the case of transfers of property by death, as we shall proceed to demonstrate.

The right to be a corporation or to do business in that form is a valuable privilege.

“ * * * It is a right or privilege by which several individuals may unite themselves under a common name and act as a single person, with a succession of members, without dissolution or suspension of business and with a limited individual liability. * * *.”

Home Ins. Co. v. New York, (1890) 134 U. S. 594, 599-600, 33 L. ed. 1025, 10 S. Ct. 593.

The object of the corporate form of enterprise is to do business in a form thought to be suited to the profitable transaction of business—to acquire earnings—and to distribute such earnings among the members of the corporation. The corporation itself is an artificial entity distinct from its members which exists for the purpose of transacting business and acquiring earnings but it is in the very nature of things incapable of enjoying its earnings. It is of the very essence of a corporate business enterprise that its earnings shall inure to the benefit of its members and that only its members shall enjoy its earnings.

Thus, protection of the law of a state in which a corporation does business is invoked and given for the purpose of making it possible to earn income for distribution to the members of the corporation. The protection so invoked and given cannot, therefore, be dissociated from the distribution of corporate earnings. Corporate income is earned for the purpose of distribution to the corporate members and the state protects the acquisition of corporate income in order that there may be earnings to distribute to the members.

There can be no doubt that the ultimate distribution of the fruits or profits from corporate business to its stockholders is the prime, if not the sole, objective of corporate

enterprise. Thus, a tax upon the transfer of corporate earnings derived from business transacted in the taxing state, is laid upon the benefits arising out of the exercise of rights under and protected by the laws of the taxing state. It taxes such benefits at the time they are realized by the very persons for whom they were earned and by whom, at the time of earning, it was intended they would be realized.

In the last analysis, therefore, as in the case of death duties, the tax involved in the present case may be rested upon the protection afforded by the state in relation to the subject of the transfer. As we have indicated, it is not too much to say that protection of the laws of the state is invoked and given in order to create the subject of the transfer for the purpose of transfer. And the state, since it has jurisdiction to tax the subject of the transfer (*Shaffer v. Carter*, (1920) 252 U. S. 37, 64 L. ed. 445, 40 S. Ct. 221; *United States Glue Company v. Oak Creek*, (1918) 247 U. S. 321, 62 L. ed. 1135, 38 S. Ct. 499), at the time of transfer, may tax the transfer.

Thus we conclude that the Wisconsin Supreme Court in *State ex rel. Froedtert G. & M. Co., Inc. v. Tax Commission*, (1936) 221 Wis. 225, 265 N. W. 672, 267 N. W. 52, 104 A.L.R. 1478, was justified in sustaining the validity of Section 3 of Chapter 505, Laws of Wisconsin, 1935, as amended, as applied to both foreign and domestic corporations upon the authority of the adjudicated decisions of this Court dealing with the taxation of incomes and inheritances.

Point C.

THE WISCONSIN SUPREME COURT IN THE INSTANT CASE, WHILE IT ADHERED TO THE CONSTRUCTION OF SECTION 3 OF CHAPTER 505, LAWS OF WISCONSIN, 1935, AS AMENDED, LAID DOWN IN THE CASE OF STATE EX REL. FROEDERT G. & M. CO., INC. v. TAX COMMISSION, (1936) 221 WIS. 225, 265 N. W. 672, 267 N. W. 52, 104 A.L.R. 1478, ERRED IN HOLDING THAT THE DECISION OF THIS COURT IN CONNECTICUT GENERAL LIFE INS. CO. v. JOHNSON, (1938) 303 U. S. 77, 82 L. ed. 673, 58 S. Ct. 436 REQUIRED THAT THE TAX BE INVALIDATED AS BEYOND THE TAXING JURISDICTION OF THE STATE OF WISCONSIN UNDER THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION.

In the instant cases the Wisconsin Supreme Court, while it adhered to the construction placed upon Section 3 of Chapter 505, Laws of Wisconsin, 1935, as amended, in the case of *State ex rel. Froedert G. & M. Co., Inc. v. Tax Commission*, (1936) 221 Wis. 225, 265 N. W. 672, 267 N. W. 52, 104 A.L.R. 1478, nevertheless held the law invalid as applied to foreign corporations. The holding was based upon the assumption that the decision of this Court in *Connecticut General Life Ins. Co. v. Johnson*, (1938) 303 U. S. 77, 82 L. ed. 673, 58 S. Ct. 436, left no alternative other than to declare that the law in question, as applied to foreign corporations, imposed a tax beyond the taxing jurisdiction of the state contrary to the Fourteenth Amendment to the United States Constitution.

That the Court adhered to its former construction of the law is perfectly clear. A few quotations from the majority opinion establishes that fact beyond question:

"This Court had the constitutionality of sec. 3, ch. 505, Laws of 1935, as amended before it in State ex. rel. Froedtert G. & M. Co., Inc., Tax Comm. of Wisconsin, 1936, 221 Wis. 225, 265 N. W. 672, 267 N. W. 52, 56, 104 A.L.R. 1478. That was an action for a declaratory judgment and was brought by a Wisconsin corporation. The Court held that the tax imposed upon the Wisconsin corporation pursuant to the provisions of sec. 3, ch. 505, as amended by Laws 1935, c. 552, was a valid tax. In that case the Court held that the language of the act 'for the privilege of declaring and receiving dividends, out of income derived from property located and business transacted in this state, there is hereby imposed a tax equal to two and one-half per centum of the amount of such dividends declared and paid by all corporations (foreign and local)' imposed an excise or privilege tax upon the transaction involved of transferring the dividends from the corporation to its stockholders.' (289 N. W. p. 679)

"There was a motion for a rehearing in the Froedtert case and briefs amicus curiae were filed by counsel appearing on behalf of foreign corporations. While the application of the law to foreign corporations was not before the Court upon the pleadings in the case, the Court concluded to consider the validity of the act as applied to foreign corporations and held: [221 Wis. 245]. 'We perceive no more difficulty in taxing the transfer of dividends of foreign corporations attributable to business transacted or property situated within the state than in taxing such corporations on income so derived, and the validity of the latter form of taxation is established. The fact that the dividends involved are derived from earnings within the state gives them a constructive situs within the

state. They are as readily collectible as is an income tax against a foreign corporation. Liability for payment of the tax is imposed upon the corporation. If such liability may be imposed, there is no difficulty about collecting it, and there is no more difficulty about imposing the liability than existed in the Travis Case [Travis v. Yale & Towne Mfg. Co., 252 U. S. 60, 40 S. Ct. 228, 64 L. Ed. 460], *supra*, about imposing upon the employer liability for the income tax on salaries of nonresidents earned within the state.'

"This decision of the Court is vigorously assailed. We are earnestly besought to reconsider the decision of the Froedtert case so far as it applies to foreign corporations. It is agreed on all sides that the tax in question is an excise tax and this Court so held in the Froedtert case. The Court in effect held that the tax was an excise tax 'for the privilege of declaring and receiving dividends out of income derived from property located and business transacted in this state' and was therefore subject to the jurisdiction of the state as are incomes and inheritances. It is apparent that upon this basis the tax imposed by subsec. (1), sec. 1 of the act can not be imposed upon dividends declared by a foreign corporation because they are not declared within this state nor is the privilege one granted by this state. To meet this objection on the motion for rehearing the Court held that a dividend declared by a foreign corporation was taxable to the extent that it was allocable to business transacted or property situated in this state because the dividend involved the distribution of earnings made within the state and such earnings had a constructive situs within the state." (Pages 679-680)

"In the Froedtert case we rejected the contention that the tax was a tax on property (221 Wis. at page 235, 265 N. W. 672, 267 N. W. 52, 104 A.L.R. 1478) and rested the right of Wisconsin to tax the dividend in question on the ground that that part of the dividend taxed having been earned within the state, the trans-

action of declaring and receiving the dividend had a situs within the state although the transaction took place in another state. * * * (Page 681)

J. C. Penney Co. v. Wisconsin Tax Commission,
(1940) 233 Wis. (adv. sheets) 286, 289 N. W. 677.

That the court below rested its decision upon *Connecticut General Life Ins. Co. v. Johnson*, (1938) 303 U. S. 77, 82 L. ed. 673, 58 S. Ct. 436, is equally clear as demonstrated by the following language in the opinion:

"This determination of the Supreme Court of the United States [*Connecticut General Life Ins. Co. v. Johnson*, (1938) 303 U. S. 77, 82 L. ed. 673, 58 S. Ct. 436] clearly holds that the fact that a fund which became the subject of a transaction in the state of Connecticut was earned within the state of California and might have been taxed there, does not give the transaction in Connecticut a situs within the state of California for the purposes of taxation. In our view the California case is a stronger case for jurisdiction to tax by a state than is the present case because in that case nothing but insurance premiums paid in California were dealt with and in levying the tax upon the company which did the business in California the amount of the reinsurance premiums was deducted in cases where the reinsurance premium was paid to a company authorized to do business in California. In both cases the thing taxed is a transaction without the state made pursuant to a privilege or right granted by another state measured by the amount of a fund earned in the taxing state. Under the Connecticut General Life Ins. Co. case, there being no constructive situs within the state of Wisconsin for the taxation of the transaction of declaring and receiving dividends in the state of New York, there is no basis for an excise tax within the state of Wisconsin upon the

dividend in question. Certainly the payment of a re-insurance premium on business done in the state of California to a company authorized to do business in California is more closely connected to California business than is the declaration of a dividend in the state of New York although that part of the dividend taxed accrued from earnings made in Wisconsin. If there is no situs for taxation purposes in the one case there certainly is not in the other. We are obliged to hold that the transaction of declaring and receiving the dividend in question was not taxable in the state of Wisconsin.

"[2] Diligent and able counsel for the state have been unable to suggest any other basis upon which the tax involved in this case can be sustained than that suggested in the Froedtert case. We have given the matter thorough and careful consideration because of the importance of the question involved and the effect a ruling adverse to the defendant will have upon state finances. While there is much to be said for the proposition that a foreign corporation admitted to do business in Wisconsin should be subject to the same burdens and liabilities as is a similar Wisconsin corporation, we must in the determination of this question conform to the law as laid down by the Supreme Court of the United States. The question here involved is one of the incidence of taxation and not whether the state has jurisdiction of certain corporate activities by reason of a business situs of a corporation. No claim is made that the plaintiff has any such situs nor is there any evidence in the record upon which such a claim can be based.

"[3, 4] We are strongly urged to affirm the judgment in this case because the state treasury is dependent upon the maintenance of the right of the state to tax dividends of foreign corporations to the extent that such dividends are derived from earnings within the state. The matter of financial exigencies of the state, however, afford no justification for the ignoring

of a rule of law laid down by the United States Supreme Court. The state must find its revenues within the field within which its taxing power may be exerted as prescribed by the constitution and laws of the United States." (Pages 681-682)

J. C. Penney Company v. Tax Commission, (1940)
233 Wis. (adv. sheets) 286, 289 N. W. 677.

We are not, therefore, confronted with a situation where the Wisconsin Supreme Court has changed its construction of the law but rather with a situation where, on the basis of its former construction, it felt compelled to invalidate its application of the law to foreign corporations upon ~~the basis~~ ^{by reason} of a subsequent decision rendered by this Court construing the taxing powers of the states under the Fourteenth Amendment.

We respectfully submit that the Supreme Court of Wisconsin erred in supposing that its decision in the case below was required by the holding of this Court in *Connecticut General Life Ins. Co. v. Johnson*, (1938) 303 U. S. 77, 82 L. ed. 673, 58 S. Ct. 436. In that case the question before the Court for decision was stated in its opinion as follows:

"Appellant is a Connecticut corporation, admitted to do an insurance business in California. In addition to its business conducted within that state it has entered into contracts with other insurance corporations likewise licensed to do business in California, reinsuring them against loss on policies of life insurance effected by them in California and issued to residents there. These reinsurance contracts were entered into in Connecticut where the premiums were paid and where the losses, if any, were payable. The question for decision is whether a tax laid by Cali-

fornia on the receipt by appellant in Connecticut of the reinsurance premiums during the years 1930 and 1931, infringes the due process clause of the Fourteenth Amendment."

Connecticut General Life Ins. Co. v. Johnson,
(1938) 303 U. S. 77, 78, 82 L. ed. 673, 58 S. Ct. 436.

The Court's analysis of the problem presented is contained in the following language:

"Appellant, by its reinsurance contracts, undertook only to indemnify the insured companies against loss upon their policies written in California. The reinsurance involved no transactions or relationship between appellant and those originally insured, and called for no act in California. *Connecticut General L. Ins. Co. v. Johnson*, *supra* (3 Cal. (2d) 87, 43 P. (2d) 278); compare *Morris & Co. v. Skandinavia Ins. Co.* 279 U. S. 405, 408, 73 L. ed. 762, 765, 49 S. Ct. 360. Apart from the facts that appellant was privileged to do business in California, and that the risks reinsured were originally insured against in that state by companies also authorized to do business there, California had no relationship to appellant or to the reinsurance contracts. No acts in the course of their formation, performance or discharge, took place there. The performance of those acts was not dependent upon any privilege or authority granted by it, and California laws afforded to them no protection."

Connecticut General Life Ins. Co. v. Johnson,
(1938) 303 U. S. 77, 81, 82 L. ed. 673, 58 S. Ct. 436.

The conclusion reached was to the following effect:

"* * * All that appellant did in effecting the reinsurance was done without the state and for its trans-

action no privilege or license by California was needful. The tax cannot be sustained either as laid on property, business done, or transactions carried on within the state, or as a tax on a privilege granted by the state."

Connecticut General Life Ins. Co. v. Johnson,
(1938) 303 U. S. 77, 82, 82 L. ed. 673, 58 S. Ct. 436.

As we understand the foregoing opinion, the holding simply amounts to the proposition that the State of California cannot tax a reinsurance business carried on in the State of Connecticut, even though it involves reinsurance contracts covering the lives of people who had originally been insured in the State of California. Putting the same thing differently, it was held that while the State of California may tax the transaction of business in that State, it may not tax a business which is transacted in another state.

The case at bar is an entirely different case. As was pointed out in the dissent of Justice Fowler (who wrote the opinion of the Court in *State ex rel. Froedtert G. & M. Co., Inc. v. Tax Commission*, (1936) 221 Wis. 225, 265 N. W. 672, 267 N. W. 52, 104 A.L.R. 1478):

**** The object of the California tax was the reinsurance premium received and contracted for in the state of Connecticut. The receipt and the contract were in no way connected with, in no way incidental to any transaction of the insurance company in California, and were in no way connected with or incidental to any earnings of the company from business conducted in California. The object of the instant tax is the declaration of a dividend made in New York on earnings of the plaintiff corporation through business

transacted in the state of Wisconsin. The declaration of the instant dividend was connected with, was incidental to, related back to, the business conducted in Wisconsin on the earnings of which the tax was computed. The reason for the invalidity of the California tax does not apply to the instant case. * * *."

J. C. Penney Company v. Tax Commission, (1940) 233 Wis. (adv. sheets) 286, 289 N. W. 677, 683.

Thus, as indicated by Justice Fowler, the tax in the instant case is laid upon the distribution of corporate earnings derived from Wisconsin sources, under the protection of Wisconsin law, and confessedly subject to taxation in the State of Wisconsin.

The tax law here involved does not assume to tax any transaction outside the state, such as the declaration and payment of a dividend independent of the taxable situs of the income so devolved. It assumes to lay a tax upon a devolution of income which, for taxable purposes, occurs within the state and the power to tax the devolution is derived from the same source as the power to tax the income itself, namely,—the power to tax Wisconsin earnings.

Thus, we conclude that the Wisconsin Supreme Court erred in holding that the decision of this Court in *Connecticut General Life Ins. Co. v. Johnson*, (1938) 303 U. S. 77, 2 L. ed. 673, 58 S. Ct. 436, required it to overrule its holding in the case of *State ex rel. Froedtert G. & M. Co., Inc. v. Tax Commission*, (1936) 221 Wis. 225, 265 N. W. 672, 267 N. W. 52, 104 A.L.R. 1478 and to invalidate Section 3 of Chapter 505, Laws of Wisconsin, 1935, as amended, as applied to foreign corporations, such as is respondent.

Point D.

THE DECLARATION AND PAYMENT OF DIVIDENDS OUTSIDE OF THE STATE OF WISCONSIN BY A FOREIGN CORPORATION DOES NOT ITSELF CONSTITUTE AN EVENT TAXABLE BY WISCONSIN AND THE COURT BELOW PROPERLY SO HELD. WHERE THE INCOME DISTRIBUTED IS DERIVED FROM WISCONSIN EARNINGS, HOWEVER, AND THUS FORMS THE SUBJECT MATTER OF THE TRANSFER, THE STATE OF WISCONSIN ACQUIRES JURISDICTION TO TAX THE TRANSFER.

In the cases below the Wisconsin Supreme Court, in its analysis as to state jurisdiction, applied the following reasoning:

(1) The exercise by a foreign corporation without the state of the power to declare and pay a dividend is not in itself taxable by the State of Wisconsin, since

(a) The privilege to declare the dividend is not granted by the State of Wisconsin, and,

(b) The physical acts of declaring and paying the dividend do not occur within the territorial limits of Wisconsin.

(2) The fact that a dividend so declared and paid by a foreign corporation is derived from Wisconsin earnings does not empower the state to tax the transfer of such earnings effected by the declaration and payment of said dividend, since this Court had, in substance, so held in *Connecticut General Life Ins. Co. v. Johnson*, (1938) 7503 U. S. 77, 82 L. ed. 673, 58 S. Ct. 436.

With the first of these propositions we do not disagree. It is perfectly evident that the State of Wisconsin may not, as an independent basis of taxation, tax the exercise of a privilege which it does not grant. Neither may it, as an independent basis of taxation, impose a tax upon a transaction which occurs without its territorial jurisdiction.

But the present case does not turn upon any such consideration. The law here involved does not assume to tax a privilege granted by the State. As stated by the Court in *State ex rel. Froedtert G. & M. Co., Inc. v. Tax Commission*, (1936) 221 Wis. 225, 230, 265 N. W. 672, 267 N. W. 52, 104 A.L.R. 1478, the tax is laid upon the exercise of a right. Foreign corporations derive the privilege of declaring and paying dividends from the states of their incorporation. But, as indicated in the opinion of the Wisconsin Court in the *Froedtert Case* (221 Wis. 225, 265 N. W. 672, 267 N. W. 52, 104 A.L.R. 1478), the State of Wisconsin may tax the exercise of rights. And, as we have heretofore pointed out, the right to impose a transfer tax does not depend upon the fact that the taxing power grants the privilege to make the transfer.

Snyder v. Bettman, (1903) 190 U. S. 249, 47 L. ed. 1035, 23 S. Ct. 803;

Knowlton v. Moore, (1900) 178 U. S. 41, 44 L. ed. 969, 20 S. Ct. 747.

So far as declaration and payment of the dividend in a state outside of Wisconsin is concerned, it may be said that while such a transaction is not an independent basis for the imposition of a tax by the State of Wisconsin, it is most certainly a taxable event if the subject matter of the transfer is taxable by the State of Wisconsin.

In *Estate of Bullen*, (1910) 143 Wis. 512, 128 N. W. 109, Mr. Bullen, by an instrument executed in the State of Illinois and pursuant to the laws of the State of Illinois, transferred intangible property in trust to trustees resident in Illinois. He reserved to himself control over the income of the trust during his life time and also the power to revoke the trust. He died, domiciled in the State of Wisconsin, without having exercised his power of revocation. Against the specific objection that the transfer was effectuated outside the State of Wisconsin pursuant to the laws of another state, the Wisconsin Supreme Court held that the intangibles forming the subject matter of the trust could be regarded as located at the domicile of the decedent for transfer tax purposes.

Upon appeal to this Court it was held, *Bullen v. Wisconsin*, (1916) 240 U. S. 625, 60 L. ed. 830, 36 S. Ct. 473, that the control retained by Mr. Bullen during his life time over the trust, and his power to revoke it, constituted important property rights. It was held that the non-exercise of the power of revocation during the life of Mr. Bullen resulted in the beneficiaries of the trust acquiring valuable rights by reason of Mr. Bullen's death. The court held that Mr. Bullen, having been domiciled in Wisconsin at the time of his death, the State could tax the transfer resulting from his death.

Substantially the same holding was made by this Court in *Graves v. Elliott*, (1939) 307 U. S. 383, 83 L. ed. 1356, 59 S. Ct. 913.

In each of these cases the instrument pursuant to which the property was transferred was executed without the State that was permitted to impose a transfer tax,

and in each case the instrument was executed pursuant to the law of the State of its execution.

For a similar case see *Curry v. McCanless*, (1939) 307 U. S. 357, 83 L. ed. 1339, 59 S. Ct. 900, where a testamentary disposition by a person domiciled in the State of Tennessee of intangibles forming the subject matter of a trust held by an Alabama trustee and administered in Alabama was held to be subject to a transfer tax in the State of Alabama. In that case the testamentary act of the decedent occurred in Tennessee and presumably was executed according to the laws of the State of Tennessee.

These cases turn upon the application of a rule which, as we have pointed out, is well established by the decisions of this Court, namely, that where property forming the subject of a transfer is taxable by the State, its transfer occurs within the jurisdiction of the State for tax purposes.

It is thus evident that the declaration and payment of a dividend by a foreign corporation in the State of New York, while it is not, as we have said, in itself a taxable event in the State of Wisconsin, may constitute such an event when the subject matter of the transfer is taxable by the State of Wisconsin.

As to the second proposition held by the Wisconsin Supreme Court, namely that the derivation of income from Wisconsin earnings did not endow the State with power to tax a transfer of such earnings,—we have already demonstrated that the case thought by the Court to require such a holding (*Connecticut General Life Ins. Co. v. Johnson*, (1938) 303 U. S. 77, 82 L. ed. 673, 58 S. Ct. 436) is inapplicable. In fact such decisions of this Court as are ap-

plicable clearly demonstrate the error of the Court below in holding as it did.

The decisions of this Court, as we have heretofore pointed out, hold that a state in which a corporation or an individual acquires earnings may impose a tax upon those earnings or a tax measured by such earnings.

Underwood Typewriter Company v. Chamberlain,
(1920) 254 U. S. 113, 65 L. ed. 165, 41 S. Ct. 45;

Travis v. Yale & Towne Mfg. Co., (1920) 252 U. S. 60, 64 L. ed. 460, 40 S. Ct. 228;

Shaffer v. Carter, (1920) 252 U. S. 37, 64 L. ed. 445, 40 S. Ct. 221;

United States Glue Company v. Oak Creek, (1918) 247 U. S. 321, 62 L. ed. 1135, 38 S. Ct. 499.

The fact that the earnings of a corporation which are derived from the State of Wisconsin may be represented by bank deposits in other states obviously does not deprive the State of Wisconsin of the right to tax such earnings and so far as we are advised no one has ever contended that it did.

For the same reason, the presence of Wisconsin earnings in out-of-state banks can not affect the right of the State to impose a transfer tax on such earnings. In either event the jurisdiction to tax arises by reason of the fact that the earnings have been derived from Wisconsin and not by reason of the fact that there is any tangible subject of taxation within the State at the time the tax is imposed.

We are unable to determine how it can possibly be said that the net income of a foreign corporation has a situs in the State of Wisconsin for the purpose of imposing a tax upon that income but does not have a situs in the State

for the purpose of imposing a tax based upon its transfer from the corporation to the stockholders of the corporation in the form of dividends. Certainly the decisions of this Court neither require nor justify any such distinction.

Quite to the contrary we have been unable to find any case in which the power of a state to tax the subject of a transfer is not held to justify the imposition of a tax upon the transfer, so far as jurisdictional aspects are concerned. The following cases indicate that power to tax the subject is the proper test.

Graves v. Elliott, (1939) 307 U. S. 383, 83 L. ed. 1356, 59 S. Ct. 913;

Curry v. McCanless, (1939) 307 U. S. 357, 83 L. ed. 1339, 59 S. Ct. 900;

Rhode Island Hospital Trust Co. v. Doughton, (1926) 270 U. S. 69, 70 L. ed. 475, 46 S. Ct. 256;

Snyder v. Bettman, (1903) 190 U. S. 249, 47 L. ed. 1035, 23 S. Ct. 803.

Looking beyond the mere form of things it is evident that the stockholders of a corporation earning money within the State of Wisconsin, under the protection of its laws, for the purpose of distributing that money among themselves, may lawfully be required to pay something for the protection given them by the State of Wisconsin.

Curry v. McCanless, (1939) 307 U. S. 357, 83 L. ed. 1339, 59 S. Ct. 900;

Shaffer v. Carter, (1920) 252 U. S. 37, 64 L. ed. 445, 40 S. Ct. 221.

It certainly is not necessary, however, that the State of Wisconsin measure any tax exacted as payment for such

protection by the total net income of the corporation. The State can measure its exaction by that part of the net income which is distributed to its shareholders.

The fact that a tax is measured by the "amount of dividends declared" cannot be made the basis of a tenable constitutional objection to a taxing act imposing a tax so measured. The use of "amount of dividends declared" as the measure of a tax is not only proper, but just and equitable. Measuring of taxes by dividends paid is not new but is supported by precedent of long standing. Pennsylvania, New York and the Federal Government have, at one time or another, imposed taxes which were measured by the amount of dividends declared by corporations.

As early as 1814, and for years thereafter, Pennsylvania imposed upon corporations, taxes measured in part or in whole by the amount of dividends declared.

See Sec. 10, Chapter 3902, Laws of Pennsylvania, 1814;
 Sec. 1, Act No. 232, Laws of Pennsylvania, 1840;
 Sec. 33, Act No. 318, Laws of Pennsylvania, 1844;
 Sec. 1, Act No. 523, Laws of Pennsylvania, 1859;
 Sec. 21, Act No. 332, Laws of Pennsylvania, 1889.

The above acts were applied and taxes levied thereunder sustained in numerous cases decided by the Pennsylvania courts, constitutionality thereof having been assumed, as it was neither raised nor considered.

Commonwealth v. Cleveland, Painesville, and Ash-tabula R. R. Co., (1857) 29 Pa. St. 370;
Lehigh Crane Iron Co. v. Commonwealth, (1867)
 55 Pa. St. 448;

Phoenix Iron Co. v. Commonwealth, (1868) 59 Pa. St. 104;

Commonwealth v. Western Land & Improvement Co., (1893) 156 Pa. St. 455, 26 Atl. 1034.

New York also has enacted statutes imposing taxes on certain corporations which taxes were measured by the amount of dividends declared. See Sections 182 and 186, Article 9, Chapter 60, Consolidated Laws of New York. Here also the said acts were applied and taxes levied thereunder sustained, the constitutionality thereof apparently having been assumed, as it was neither raised nor considered.

People ex rel. Mercantile Safe Deposit Co. v. Sohmer, (1913) 158 App. Div. 110, 143 N. Y. S. 313;

People ex rel. Adams Elec. Light Co. v. Graves, et al., (1936) 272 N. Y. 77, 4 N. E. (2d) 941;

People ex rel. Central Zone Property Corporation v. Graves, et al., (1937) 250 App. Div. 175, 294 N. Y. S. 177;

In the Matter of Mercantile Properties v. State Tax Commission, (1938) 278 N. Y. 325, 16 N. E. (2d) 352.

Chapter 361, Laws of New York, 1881, imposed upon every corporation a tax measured by each 1% of dividends declared in excess of 6% on capital stock, or if the dividends declared were less than 6% the tax was at a specified rate upon the par value of the capital stock. Over numerous constitutional objections, the said act was sustained in *Home Insurance Co. v. New York*, (1890) 134 U. S. 594, 33 L. ed. 1025, 10 S. Ct. 593, as applied to domestic corporations and in *Horn Silver Mining Co. v. New York*,

(1892) 143 U. S. 305, 36 L. ed. 164, 12 S. Ct. 403, as applied to foreign corporations merely licensed to do business in the State of New York.

Under Section 122 of the Federal internal-revenue law, as amended by the Act of 1866 (13 Stat. at Large 284, 14 Stat. at Large 138) there was imposed a tax of five per cent on all interest payable and dividends declared by any railroad or canal company, and other types of specified companies, whenever payable, and under the said Act the companies were authorized to deduct the amount of the tax from the amount payable to the bondholder or stockholder. The said Act was applied without question as to its constitutionality, its constitutionality being assumed, in *Barnes v. The Railroad*, (1873) 17 Wall. (84 U. S.) 294, 21 L. ed. 544 and in *Bailey v. N. Y. C. & H. R. R. Co.*, (1875) 22 Wall. (89 U. S.) 604, 22 L. ed. 840. In *Railroad Co. v. Collector*, (1879) ^XOtto (100 U. S.) 595, 25 L. ed. 647, the said Act was sustained over constitutional objections that the tax as applied to the amounts payable to citizens and residents of foreign countries was invalid.

For an even more recent Federal tax so measured, see: Act of Congress, Jan. 16, 1933, Chap. 90, Sec. 213(a) (48 Stats. at Large, pt. 1, page 206).

And so far as the presence of the corporate income within the State of Wisconsin is concerned, if the State could lay a tax upon the corporation measured by a percentage of its income distributed to stockholders, and payable at the time of distributing it, the State can certainly lay a tax upon the distribution of the income to the stockholders. In neither case is the income physically within the State. It is here for purposes of taxation only. And

jurisdiction that does not depend upon physical presence in the state, certainly is not lost by reason of physical absence from the state.

Curry v. McCandless, (1939) 307 U. S. 357, 83 L. ed. 1356, 59 S. Ct. 913;

First Bank Stock Corp. v. Minnesota, (1937) 301 U. S. 234, 81 L. ed. 1061, 57 S. Ct. 677.

Since the argument under this point of our briefs to some extent at least, involves a recapitulation of arguments already advanced we do not intend to belabor the court with a repetition of all such arguments. We merely direct the Court's attention, therefore, to those arguments advanced under Point B.

But one thing remains to be considered in this part of the argument. We contended in our petitions for certiorari that under the decisions of *Barnes v. The Railroads*, (1873) 17 Wall. (84 U. S.) 294, 21 L. ed. 544, and *Railroad Company v. Collector*, (1879) 100 U. S. 595, 25 L. ed. 647, the tax here in question is, in substance, imposed upon the corporations required to pay it. Respondents will undoubtedly contend to the contrary as they did in the State Court. We do not relent from our position thus asserted. However, whatever may be the correct view upon that question is immaterial for the purpose of determining the constitutionality of the tax in question. The fact that the State of Wisconsin may not impose a tax upon the recipient of a dividend does not militate against the right of the State to impose a transfer tax upon a subject matter transferred to him and to require deduction of the amount of the tax from the subject of the transfer.

Greiner v. Lewellyn, (1922) 258 U. S. 384, 66 L. ed. 676, 42 S. Ct. 324;
Snyder v. Bettman, (1903) 190 U. S. 249, 27 L. ed. 1035, 23 S. Ct. 803.

We accordingly conclude that the State of Wisconsin had jurisdiction to impose the tax in question and that the decision of the Wisconsin Supreme Court to the contrary is erroneous and disregards the law as laid down by the decisions of this Court. The cases should be reversed.

Respectfully submitted,

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APPENDIX.

Section 3, Chapter 505, Laws of Wisconsin, 1935, Effective, On Its Publication on September 26, 1935, and as Amended by Chapter 552, Laws of Wisconsin, 1935, Effective on Its Publication on October 8, 1935, Provides:

Section 3. Privilege Dividend Tax. (1) For the privilege of declaring and receiving dividends, out of income derived from property located and business transacted in this state, there is hereby imposed a tax equal to two and one-half per centum of the amount of such dividends declared and paid by all corporations (foreign and local) after the passage and publication of this act and prior to July 1, 1937. Such tax shall be deducted and withheld from such dividends payable to residents and non-residents by the payor corporation.

(2) Every corporation required to deduct and withhold any tax under this section shall, on or before the last day of the month following the payment of the dividend, make return thereof and pay the tax to the tax commission, reporting such tax on the forms to be prescribed by the tax commission.

(3) Every such corporation hereby made liable for such tax, shall deduct the amount of such tax from the dividends so declared.

(4) In the case of corporations doing business within and without the state of Wisconsin, such tax shall apply only to dividends declared and paid out of income derived from business transacted and property located within the

state of Wisconsin. The amount of income attributable to this state shall be computed in accordance with the provisions of chapter 71. In the absence of proof to the contrary, such dividends shall be presumed to have been paid out of earnings of such corporation attributable to Wisconsin under the provisions of chapter 71, for the year immediately preceding the payment of such dividend. If a corporation had a loss for the year prior to the payment of the dividend, the tax commission shall upon application, determine the portion of such dividend paid out of corporate surplus and undivided profits derived from business transacted and property located within the state.

(5) Dividends paid by a subsidiary corporation to its parent shall not be subject to the tax herein imposed provided that the subsidiary and its parent report their income for taxation under the provisions of chapter 71 on a consolidated income return basis, or both corporations report separately.

(6) The provisions of this section shall not apply to dividends declared and paid by a Wisconsin corporation out of its income which it has reported for taxation under the provisions of chapter 71, to the extent that the business of such corporation consists in the receipts of dividends from which a privilege dividend tax has been deducted and withheld and the distribution thereof to its stockholders.

(7) For the purposes of this section, dividends shall be defined as in section 71.02, except that the tax herein imposed shall not apply to stock dividends or liquidating dividends.

(8) The tax hereby levied, if not paid within the time herein provided, shall become delinquent and when delinquent shall be subject to a penalty of two per cent on the amount of the tax and interest at the rate of one-half per cent per month until paid.

(9) The tax hereby imposed shall, when collected by the tax commission, be paid by it into the state treasury."

(Note: The same provisions are now contained, with some additions, in the present Wisconsin tax laws. See Section 71.60, Wis. Stats. 1939.

Chap. 309, Sec. 3, Laws of Wisconsin, 1937, extended its date of applicability to July 1, 1939.

Chap. 198, Sec. 1, Laws of Wisconsin, 1939, extended its date of applicability to July 1, 1941, and increased the rate of tax to 3%.)

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In The
Supreme Court of the United States

October Term, 1940

No. 48

STATE OF WISCONSIN, and ELMER E. BARLOW,
as Commissioner of Taxation of the State of Wis-
consin,
Petitioners,

vs.

MINNESOTA MINING AND MANUFACTURING
COMPANY, a Delaware Corporation,

Respondent.

Brief of Respondent

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In The
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October Term, 1940

No. 48

STATE OF WISCONSIN nad ELMER E. BARLOW,
as Commissioner of Taxation of the State of Wis-
consin, Petitioners,

vs.

MINNESOTA MINING AND MANUFACTURING
COMPANY, a Delaware Corporation,

Respondent.

Brief of Respondent

I.

THE OPINION OF THE COURT BELOW.

The opinion delivered in the court below is reported in 233 Wis. (Advance Sheets, No. 3) 306, and also reported in 289 N. W. 686.

II.

JURISDICTION.

The jurisdiction of this court was invoked under the provisions of Sec. 237b of the Federal Judicial Code (28 U. S. C. A. 344 (b)).

This court issued a writ of certiorari in this case to review the judgment of the Supreme Court of the State of Wisconsin. The respondent in this case, in its brief filed in opposition to the petition for the granting of the writ, contended that the decision of the Wisconsin Supreme Court was based upon an independent ground of state law and further contended that there was no substantial federal question involved. Respondent reiterates these contentions and in support thereof incorporates by way of reference the arguments contained in its brief filed in opposition to the petition for writ of certiorari, pages 3-16 inclusive.

III.

STATEMENT OF CASE.

This action involves the constitutionality of Section 3 of Chapter 505 of the Laws of Wisconsin for 1935, as amended by Chapter 562 of the Laws of Wisconsin for 1935, as amended by Laws of Wisconsin for 1937, Chapters 223 and 309, imposing a so-called privilege dividend tax.

The respondent is a corporation duly organized and existing by virtue of the laws of the State of Delaware, with its principal place of business in the City of Saint Paul, State of Minnesota; and operating a

factory manufacturing Colorquartz at Wausau, Wisconsin; also operating factories at Detroit, Michigan, Copley, Ohio, and Saint Paul, Minnesota. (R. p. 5).

The respondent's Wausau factory ships its products to Chicago and points West. The sales from the Wausau plant are handled through a Mr. Voss, who has an office in Chicago. He contacts various roofing companies and gets orders for roofing granules, sends the orders to Saint Paul; and shipping instructions are sent from roofing companies to Saint Paul, where decision is made as to when the shipment shall be made. When shipments are made, the Wausau plant prepares a shipping ticket, upon which is shown the tonnage shipped. The ticket is sent to Saint Paul, where it is priced and the bill sent from Saint Paul to the consumer. The consumer then remits directly to the respondent's Saint Paul office, and proceeds are deposited in Saint Paul banks. The Wisconsin employes of respondent are paid on time cards prepared at the Wausau plant and sent to Saint Paul, where extensions are made and checks are drawn on a Wausau bank, signed by an officer at Saint Paul, and sent to the Wausau plant manager for distribution. A deposit in equal amount to the total of the payroll is sent the same day to the Wausau bank. (R. 65).

The collections from the customers of the respondent's Wausau plant are deposited in a Saint Paul bank, and these funds are commingled with funds from respondent's other factories and other divisions of its business, including income from intangibles. These funds are then used to pay bills, royalties, and

dividends. (R. 65).

Respondent, in 1935, received \$10,191.37 and in 1936, \$14,331.65 — interest from Federal securities. These securities were actually kept in the vault of a bank in Saint Paul, coupons were clipped at the bank in Saint Paul and deposited in the Saint Paul bank for collection. No part of the interest was ever received, paid, or deposited in the State of Wisconsin. (R. 65-66).

Respondent, in 1935, received dividends of \$328,096.23 and interest from other than Federal securities of \$27,125.17 and interest on State obligations of \$173.25. In 1936 respondent received dividends of \$254,834.00 and interest from obligations other than Federal of \$7,797.53. None of the interest on any of the bonds which was received by the respondent for the years 1935 and 1936 was secured by any mortgage or trust deed on any Wisconsin property; and none of the dividends was received on any stock from any company operating or doing business in Wisconsin in the years 1935 and 1936. (R. 66).

Respondent, in 1935, received royalties on patents owned by it of \$154,447.53, of which \$224.20 were earnings in Wausau, Wisconsin, leaving a balance of \$154,223.33 earned by the respondent and received by the respondent outside the State of Wisconsin. (R. 66).

Respondent, in 1936, received royalties on patents owned by it of \$153,623.35, of which \$144.76 were royalties used in the Colorquartz operations at Wausau, Wisconsin, leaving a balance of \$153,478.59 earned from royalties outside the State of Wisconsin.

(R. 67).

It was stipulated by the parties hereto that the intangibles from which the royalties were derived had no business situs in Wisconsin. (R. 67).

Respondent's 1935 income was derived from the following sources:

Source	Amount
Dividends	\$328,096.23 (R. 66).
Interest Bonds	27,125.17 (R. 66).
Interest U. S. Obligations	10,191.37 (R. 65).
Interest State Obligations	173.25 (R. 66).
Royalty on Patents	154,447.53 (R. 66).
Wisconsin Earnings (factory)	261,157.62 (R. 70).
Earnings: Saint Paul, Minnesota; Copley, Ohio; Detroit, Michigan (factories) ..	1,373,924.79 (R. 70).
	<hr/> \$2,155,116.96

On January 1, 1936, respondent's total stockholders were 1,961, owning 961,260 shares of stock, distributed in practically every State in the Union. (R. 62). There were 42 stockholders in Wisconsin, owning 3,006 shares. Since January 1, 1936, 347 stockholders, owning 138,747 shares of stock have transferred their stock. Of this number 20 reside in Wisconsin, owning 1,377 shares of stock. On January 1, 1938, there were 44 Wisconsin stockholders owning 4,944 shares of stock. (R. 62).

All dividends of the respondent are declared at meetings of the Board of Directors in Saint Paul, Minnesota. No dividends are declared in Wisconsin. (R. 68).

When dividends are declared by the directors, a check is drawn on the First National Bank of Saint Paul for the full amount of the dividend, including the treasury stock, payable to the First Trust Company of Saint Paul, its transfer agent. (R. 68) It

actually pays the dividends to the stockholders of the respondent and returns the dividend allotted to the number of shares held by the respondent. (R. 68). None of the money which is turned over to the transfer agent at the time the dividends are declared is drawn on any Wisconsin bank. (R. 68).

Respondent's dividends purported to be taxed:

Type of Stock	Date Declared	Date Paid	Amount
Common	12-16-35	1-2-36	\$ 215,909.83
Common	3-10-36	4-1-36	216,380.97
Common	6-17-36	7-1-36	288,278.00
Common	9-22-36	10-1-36	336,441.00
Common	12-7-36	12-22-36	624,819.00
Total dividends declared.			\$1,681,828.80
			(R. 48; Exhibit 3, Schedule 3)

The tax imposed upon the respondent was \$6,382.75. (R. 48; Exhibit 3, Schedule 1). If the tax was for the payment in Wisconsin by the respondent through its transfer agent of its dividends to Wisconsin residents, the tax would have been \$131.49. (R. 10). On each of the dates dividends were declared and / or paid by the respondent the number of stockholders residing in the State of Wisconsin has not been greater than 42 and the number of shares held by stockholders in Wisconsin has not been greater than 4,944. (R. 64). Tabulating the amounts received by Wisconsin residents from the payment of respondent's dividends the proportion of such amounts received by Wisconsin residents allocable to Wisconsin earnings (based on the computation used by the Tax Commission in reaching the assessment) and the tax on the amount received by the Wisconsin residents allocable to Wisconsin earnings (based upon the figures used by the Tax Commission) are as follows:

Dividend Date	(1)	(2)	(3)
1- 2-36	\$215,909.83 x .003127	\$ 675.15 x 2.5%	\$ 16.88
4- 1-36	216,380.97 x .003127	676.62 x 2.5%	16.92
7- 1-36	288,278.00 x .003127	901.45 x 2.5%	22.54
10- 1-36	336,441.00 x .003127	1,052.05 x 2.5%	26.30
12-22-36	624,819.00 x .003127	1,953.81 x 2.5%	48.85
	Total	\$131.49	

(1) represents the total amounts received by the Wisconsin residents on the payments of the respective dividends.

NOTE: The above statements—(1)—is copied from the Record, but the Record is incorrect. It should read:

- (1) represents the amount of dividends paid in 1936.
- (2) represents the portion of such amounts received by Wisconsin residents allocable to Wisconsin earnings, based on the percentage finally determined to be used by the decision of the Wisconsin Tax Commission.
- (3) represents the tax on amounts received by Wisconsin residents allocable to Wisconsin earnings. (R. 10).

The respondent does not maintain a separate system of accounts for its operations at Wausau. The respondent's Wisconsin operations are susceptible and have been allowed on a separate accounting basis. The following is a statement of its assets and liabilities in use at Wausau at the end of the years 1934, 1935, and 1936:

	ASSETS		
	1934	1935	1936
Cash	\$ 4,830.42	\$ 8,645.82	\$ 6,769.06
Real Estate	12,364.00	12,664.00	14,148.55
Buildings	189,420.87	361,149.46	370,084.52
Machinery	333,790.69	351,575.96	356,828.82
Colorquartz Machinery	179,259.66	256,736.74	257,004.25
Inventory	93,742.75	194,868.45	266,509.27
Total	\$ 813,408.39	\$ 1,185,640.43	\$ 1,271,344.47

	LIABILITIES		
Reserve for Depreciation—Buildings	\$ 6,437.48	\$ 17,448.90	\$ 32,073.59
Reserve for Depreciation—Machinery	25,714.09	59,182.01	94,545.03
Reserve for Depreciation—Colorquartz	14,863.36	36,868.60	62,435.29
Net Earnings	7,999.84	266,494.25	449,042.97
Accrued State Income Tax		2,663.21	3,635.80
Net Advances by Saint Paul	758,393.62	802,983.46	629,611.79
Total	\$ 813,408.39	\$ 1,185,640.43	\$ 1,271,344.47
(R. 62).			

All of the respondent's 1935 earnings plus \$44,589.-84 advanced from Saint Paul were used to make capital investments in Wisconsin. In 1936, \$173,371.67 of respondent's income of \$182,548.72 was used to repay advances from Saint Paul.

In December, 1929, the respondent commenced operations of its Wausau plant. It made no income in Wisconsin that year or any prior years. (R. 68).

The following table shows the respondent's Wisconsin earnings, total earnings, and dividends paid:

	Wisconsin Income	Total Net Income	% Wis. to Total	1931	Dividends Paid	Dividends to from Wis. Wis. Earnings
1930	\$ 2,396.37	\$ 685,707.54	.003494	1931	\$ 548,176.60	\$ 1,915.33
1931	11,527.67	649,547.09	1.7678	1932	500,001.66	8,839.03
1932	920.77*	448,588.07		1933	381,071.44	
1933	10,212.78	899,829.21	1.1349	1934	566,671.61	6,431.16
1934	15,216.23*	1,203,820.30		1935	690,733.54	
1935	261,157.62	2,155,116.96	12.1180	1936	1,679,692.55	203,308.74

(*) Indicate lossess.

- (1) Wisconsin Income. (R. 68-70).
- (2) Total Net Income. (R. 76).
- (3) Dividends Paid Less Dividends on Treasury Stock. (R. 71).
- (4) Dividends from Wisconsin Earnings. (R. 71).

The respondent, feeling that Section 3 of Chapter 505 of the Wisconsin Session Laws for 1935, as amended, was unconstitutional, refused to file a return under the provisions of said act, and the Tax Commission, on August 13, 1937, assessed a privilege dividend tax under said act against the respondent in the sum of \$6,382.75 with interest amounting to \$505.01 computed to September 30, 1937. (R. 45).

The respondent filed an application and amended application for hearing on said assessment within the time prescribed by law. (R. 48-62). A hearing was had on said application and amended application, resulting in the entry by the Wisconsin Tax Commission of a decision and determination that the tax be \$5,471.06 with interest amounting to \$894.52, or a total of \$6,365.58. (R. 36; Exhibit II).

The respondent took an appeal from the order of the Tax Commission to the Circuit Court for Dane

County, Wisconsin, (R. 2-38), which court, on June 10, 1939, entered an order confirming the order of the Tax Commission, dated December 19, 1938, and the privilege dividend tax imposed upon the dividends declared by the respondent on January 2, 1936, April 1, 1936, July 1, 1936, October 1, 1936, and December 22, 1936. (R. 83-86). The respondent took an appeal from the order of the Circuit Court of Dane County to the Supreme Court of the State of Wisconsin on June 12, 1939. (R. 87-88). The Supreme Court of the State of Wisconsin reversed the judgment of the Circuit Court of Dane County, sustaining the Tax Commission on January 16, 1940. (R. 94-96).

The following provisions of the Constitution of the United States are involved on this appeal:

Section 1 of Fourteenth Amendment to the Constitution of the United States:

"Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction, the equal protection of the laws."

Article I, Section 8, Constitution of the United States:

"The Congress shall have power ***

"To borrow money on the credit of the United states;

"To regulate commerce with foreign nations, and among the several states, and with the Indian tribes; * * * "

Article I, Section 10, Constitution of the United States:

"No state shall enter into any treaty, alliance, or confederation; grant letters of marque and reprisal; coin money; emit bills of credit; make any thing but gold and silver coin a tender in payment of debts; pass any bill of attainder, ex post facto law, or law impairing the obligation of contracts, or grant any title of nobility.

"No state shall, without the consent of the Congress, lay any imposts or duties on imports or exports, except what may be absolutely necessary for executing its inspection laws; and the net produce of all duties and imposts, laid by any state on imports or exports, shall be for the use of the Treasury of the United States; and all such laws shall be subject to the revision and control of the Congress. No state shall, without the consent of Congress, lay any duty of tonnage, keep troops, or ships of war in time of peace, enter into any agreement or compact with another state, or with a foreign power, or engage in war, unless actually invaded, or in such imminent danger as will not admit of delay."

Article IV, Section 1, Constitution of the United States:

"Full faith and credit shall be given in each state to the public acts, records, and judicial proceedings of every other state. And the Congress may by general laws prescribe the manner

in which such acts, records and proceedings shall be proved, and the effect thereof."

The following sections of the Wisconsin Constitution are involved on this appeal:

Article I, Section 1, Wisconsin Constitution:

"Equality. Section 1. All men are born equally free and independent, and have certain inherent rights; among these are life, liberty and the pursuit of happiness; to secure these rights, governments are instituted among men, deriving their just powers from the consent of the governed."

Article I, Section 12, Wisconsin Constitution:

"Attainder; Ex Post Facto; Contracts. Section 12. No bill of attainder, ex post facto law, nor any law impairing the obligation of contracts, shall ever be passed, and no conviction shall work corruption of blood or forfeiture of estate."

Article VIII, Section 1, Wisconsin Constitution:

"Rules of Taxation; Income Taxes. Section 1. The rule of taxation shall be uniform, and taxes shall be levied upon such property with such classifications as to forests and minerals, including or separate or severed from the land, as the legislature shall prescribe. Taxes may also be imposed on incomes, privileges and occupations, which taxes may be graduated and progressive, and reasonable exemptions may be provided."

IV.

ARGUMENT.

POINT A. The Supreme Court of Wisconsin in **State ex rel. Froedtert G. & M. Co. Inc. v. Tax Commission**, (1936) 221 Wis. 225, 265 N. W. 672, 267 N. W. 52, erroneously held that the State of Wisconsin had jurisdiction to tax the declaration and payment of dividends by a foreign corporation where the transaction took place in a foreign state, on the theory that jurisdiction to tax attached because payment constituted a devolution of income originally earned within the State of Wisconsin. In accordance with well settled principles of constitutional law as established by decisions of this Court, the Wisconsin Supreme Court in the instant case and in the case of **J. C. Penney Co. v. State of Wisconsin and Elmer Barlow, etc.**, 233 Wis. 286, decided after the Froedtert case, properly held that a law attempting to impose such a tax was unconstitutional under the Fourteenth Amendment to the Constitution of the United States.

POINT B. The Wisconsin Supreme Court properly held that the principles of law announced by this Court in the **Connecticut General Life Ins. Co. v. Johnson**, 303 U. S. 77, 82 L. ed. 673, 58 S. Ct. 436, were squarely applicable to the constitutional questions in the instant case and that on the authority of that case and other settled principles of constitutional law the Wisconsin privilege dividend tax law,

as applied to the respondent, was unconstitutional under the Fourteenth Amendment to the United States Constitution.

POINT C. The mere fact that income originally earned and taxed in Wisconsin is removed from the State of Wisconsin and later is included in a transaction which occurs wholly outside of the State of Wisconsin (in this case, the payment of a dividend), clearly does not give to the State of Wisconsin jurisdiction to tax the transaction involved.

POINT D. The decision rendered by the Supreme Court of the State of Wisconsin in the instant case, properly applied the relevant provisions of the Constitution of the United States and properly construed and applied the decisions of this Court with respect to jurisdiction of the State of Wisconsin to levy the tax in question.

POINT E. The tax law in question is unconstitutional not only under the Fourteenth Amendment to the Constitution of the United States, but is unconstitutional under several other provisions of the Constitution of United States.

POINT A.

THE SUPREME COURT OF WISCONSIN, IN STATE EX REL. FROEDERT G. & M. CO. INC. v. TAX COMMISSION, (1936) 221 wis. 225, 265 N. W. 672, 267 N. W. 52, ERRONEOUSLY HELD THAT THE STATE OF WISCONSIN HAD JURISDICTION TO TAX THE DECLARATION AND PAYMENT OF DIVIDENDS BY A FOREIGN CORPORATION WHERE THE TRANSACTION TOOK PLACE IN A FOREIGN STATE, ON THE THEORY THAT JURISDICTION TO TAX ATTACHED BECAUSE PAYMENT CONSTITUTED A DEVOLUTION OF INCOME ORIGINALLY EARNED WITHIN THE STATE OF WISCONSIN. IN ACCORDANCE WITH WELL SETLED PRINCIPLES OF CONSTITUTIONAL LAW AS ESTABLISHED BY DECISIONS OF THIS COURT, THE WISCONSIN SUPREME COURT, IN THE INSTANT CASE AND IN THE CASE OF J. C. PENNEY CO. v. STATE OF WISCONSIN AND ELMER E. BARLOW, etc., 233 Wis. 286, DECIDED AFTER THE FROEDERT CASE, PROPERLY HELD THAT A LAW ATTEMPTING TO IMPOSE SUCH A TAX WAS UNCONSTITUTIONAL UNDER THE FOURTEENTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES.

Petitioners' approach on this review assumes that the decision of the Wisconsin Supreme Court in the case of State ex. rel. Froedert G. & M. Co., Inc. v. Tax Commission, (1936) 221 Wis. 225, 265 N. W. 672, 267 N. W. 52, was correct and that its subsequent decisions in the instant case and in the case of J. C.

Penney Company v. State of Wisconsin and Elmer E. Barlow, etc., 233 Wis. 286, are incorrect. Petitioners' main approach in the matter is an attempt to justify the decision in the Froedtert case and to condemn the subsequent decision of the Supreme Court of the State of Wisconsin in the instant case. The only basis on which petitioners apparently contend that the decision of the Froedtert case can be justified is on the theory that the constitutionality of the tax was determined in that case by the same principles as apply to a determination of the validity of inheritance or estate tax laws. After an analysis of the decision in the Froedtert case counsel at page 27 of this brief state, "it becomes necessary to determine whether, on the basis of such an analogy, the tax can be sustained under the Fourteenth Amendment to the United States Constitution as interpreted by the decisions of this Court."

Counsel, so far as any authority to justify the constitutionality of the tax in question is concerned, apparently rely almost solely and exclusively on the alleged analogy between cases sustaining the constitutionality of inheritance and estate taxes and the tax in the instant case.

But the attempted analogy, which counsel urge, we submit, is palpably lacking, and we submit that the cases cited by petitioners in an effort to support the alleged analogy are not remotely applicable to the issue involved in this case.

The primary question directly involved on this review is whether the Supreme Court of the State of Wisconsin was correct in holding that Wisconsin

had no jurisdiction to tax the transaction in question because the transaction took place beyond the jurisdiction of the state.

It does not aid in the discussion of the matter to talk about "constructive situs" of the transaction. To hold or to argue that there is a constructive situs of the transaction within the State of Wisconsin is but an indirect way of contending that there is jurisdiction to tax. Fundamentally, the sole direct issue is whether Wisconsin has jurisdiction to tax a transaction concededly taking place outside of the borders of the state, solely and only because part of the property involved in the transaction may have been originally earned within the State of Wisconsin and was subject to and paid an income tax within the State of Wisconsin. (It is not conceded that any income earned in Wisconsin was distributed as dividends in 1936.)

It should be noted in passing that the decision of the Wisconsin Supreme Court in **State ex rel. Froedtert G. & M. Co., Inc. v. Tax Commission**, 221 Wis. 225, 265 N. W. 672, 267 N. W. 52, was strictly dictum, so far as the determination of constitutionality of the law as applied to foreign corporations is concerned. The question directly involved in the Froedtert case was solely and only a question on the application and the constitutionality of the law as applied to a domestic corporation. No record was before the court which in any way, either directly or indirectly, involved the factual processes of declaration of dividends by foreign corporations. While it is true that the court on motion for rehearing

passed upon the constitutionality of the law as applied to foreign corporations, nevertheless the decision in that case in this respect was strictly dictum.

Furthermore, it should be distinctly noted that the decision in the Froedtert case was rendered at a time prior to the decision of this court in **Connecticut General Life Ins. Co. v. Johnson**, 303 U. S. 78, 32 L. ed. 673, 58 S. Ct. 436.

It would appear to approach intellectual deceit to talk about the constructive situs of a physical act. The law taxes the act of declaring and receiving dividends. Such an act is of a tangible nature. In the nature of things it can only occur in one place. The Supreme Court of the State of Wisconsin in **State ex rel. Froedtert G. & M. Co., Inc. v. Tax Commission**, 221 Wis. 225, 265 N. W. 672, 267 N. W. 52, and in the case of **J. C. Penney Company v. State of Wisconsin and Elmer E. Barlow, etc.**, 233 Wis. 286, has repeatedly held that the tax in question is solely and only a tax on the transaction, that is, an excise tax on the privilege of declaring and receiving dividends from income earned or property located in Wisconsin.

That the Supreme Court of the State of Wisconsin considers the tax as solely and only a privilege tax or an excise tax conclusively appears in the **Froedtert case** in the following excerpts. At page 231 of the Wisconsin Reporter the court states:

"The briefs in opposition to the tax are largely beside the case, because they do not recognize the true nature of the tax. The tax is a privi-

lege tax, or an excise tax, one form of which is a tax imposed on the transfer of property. **** These taxes are best characterized as a tax on the transaction involved.****

and at page 233:

"However the legislature may have regarded the tax, we have no difficulty in construing the statute as imposing an excise or privilege tax upon the transaction involved of transferring the dividends from the corporation to its stockholders."

and at page 235:

"But the tax is an excise tax, a tax on the transaction involved. It is an excise tax imposed on the devolution of income, derived from transaction of business within the state, which is confessedly a proper subject of taxation."

and in the opinion in the **Froedtert case**, on the motion for rehearing, the court at page 240:

"Our position is that the tax is an excise tax on the transfer of earnings resulting from property located or business transacted within this state, and stands on the same basis of constitutionality that a state inheritance stands; * * *"

Chief Justice Rosenberry, in **J. C. Penney Co. v. State of Wisconsin and Elmer Barlow, etc.**, 233 Wis. 286, again conclusively holds at page 291 of the Wisconsin Reporter:

"It is agreed on all sides that the tax in question is an excise tax, and this court so held in the **Froedtert case**."

1.

The Construction by The Supreme Court of Wisconsin of section 3, chapter 505, Laws of Wisconsin (as amended by Chapter 552, Laws of Wisconsin, 1935) in the Froedtert case (State Ex Rel. Froedtert G. & M. Co., Inc. v. Tax Commission, (1936), 221 Wis. 225, 265 N. W. 672, 267 N. W. 52, 104 A. L. R. 1478) and in the instant case and in the case of J. C. Penney Company v. State of Wisconsin and Elmer Barlow, etc., 233 Wis. 286, and the determination of the nature and effect of the tax in both cases is final and conclusive upon this Court.

The Supreme Court of Wisconsin, in the Froedtert case (State ex rel. Froedtert G. & M. Co., Inc. v. Tax Commission, (1936) 221 Wis. 225, 265 N. W. 672, 267 N. W. 52, 104 A. L. R. 1478), and in this case below, held that the tax was an excise tax for the privilege of declaring and receiving dividends out of income derived from property located and business transacted in the State of Wisconsin.

In Ward & Gow v. Krinsky, (1922), 259 U. S. 503, 66 L. ed. 1033, this Court on page 510 of the United States Reporter, by Mr. Justice Pitney, said: (of a state court's construction of a workmen's compensation act claimed to violate the rights of employers under the Fourteenth Amendment)

"In the exercise of our appellate jurisdiction we are bound by the construction of the state law adopted by its court of last resort; hence for present purposes it must be taken as settled that the legislature intended the compensation law as

amended to apply to an employee in Krinsky's situation, precisely as if it were so declared in the words of the statute. Our function is confined to determining whether, as so construed and as applied to the concrete facts of the case, the statute contravenes the limitations imposed by the Fourteenth Amendment upon state action."

The case of **Dawson v. Kentucky Distilleries Co.**, 255 U. S. 288, 65 L. ed. 645, dealt with a tax described in the act as "an annual license tax." It was held to be in fact a property tax. This Court, by Mr. Justice Brandeis, said on page 292 of the United States Reporter:

"Here we are concerned only with the taxes which are alleged to be upon 'the business of owning and storing such spirits in bonded warehouses.' The question is whether as to such this fifty cents a gallon tax is an occupation tax or is a property tax. The question is one of local law, so that a decision of it by the highest court of the State would be accepted by us as conclusive."

In **Fox v. Standard Oil Co.**, 294 U. S. 87, 79 L. ed. 780, this Court, on page 96, by Mr. Justice Cardozo, said:

"The complainant was at liberty to maintain a suit in the state courts where the meaning of the statute could have been determined with finality."

In **Laurel Hill Cemetery v. San Francisco**, 216 U. S. 358, 54 L. ed. 515, this Court, by Mr. Justice Holmes, referred to the "great reluctance" which the Court feels "to interfere with the deliberate decisions of the

highest court of the state whose people are directly concerned."

Memphis & Charleston Railway Company v. Pace et al, 282 U. S. 241, 75 L. ed. 315, dealt with a tax levied to make a partial payment upon bonds issued by the Oldham road district in Tishomingo County, Mississippi. This Court, on page 244, by Mr. Justice Van Devanter, said:

"The supreme court of the state in the decision under review holds that the creation of the road district, the issue of the bonds and the levy of the tax were all valid under the state Constitution and the acts before cited; * * * These were all questions of state law, and their decision by that court is controlling here."

This Court, in **Highland Farms Dairy, Inc. v. Agnew**, 300 U. S. 607, 81 L. ed. 835, speaking through Mr. Justice Cardozo, said on page 613:

"A judgment by the highest court of a state as to the meaning and effect of its own constitution is decisive and controlling everywhere."

The case of **Bacon & Sons v. Martin**, 305 U. S. 378, 83 L. ed. 233, dealt with a tax imposed upon the "receipt" of cosmetics in the state by any Kentucky retailer. This Court, on page 381, Per Curiam, said:

"The construction of the statute by the state court is binding upon us. **Supreme Lodge, K. P. v. Meyer**, 265 U. S. 30, 32, 33, 68 L. ed. 885, 887, 888, 44 S. Ct. 432; **Hicklin v. Coney**, 290 U. S. 169, 172, 78 L. ed. 247, 249, 54 S. Ct. 142; **Hartford Accident**

& Indemnity Co. v. Nelson Mfg. Co., 291 U. S. 352, 358, 78 L. ed. 840, 845, 54 S. Ct. 392.

2.

Analysis of Petitioner's Point A and B.

Petitioners' arguments have been grouped under Points A, B, C and D.

Under Points A and B, petitioners cite several decisions of this Court, in which it is claimed, sustain the original decision of the Supreme Court of the State of Wisconsin in **State ex rel. Froedtert G. & M. Co., Inc. v. State Commission**, (1936) 221 Wis. 225, 265 N. W. 672, 267 N. W. 52, 104 A. L. R. 1478.

It is submitted that an analysis of the decisions cited under Points A and B do not sustain petitioners' claim.

The first, Point A, reads as follows:

"**In State ex rel. Froedtert G. & M. Co., Inc. v. Tax Commission**, (1936) 221 Wis. 225, 265 N. W. 672, 267 N. W. 52, 104 A. L. R. 1478, the Supreme Court of Wisconsin construed Section 3 of Chapter 505, Laws of Wisconsin, 1935, as amended, as imposing a tax upon the devolution or transfer of dividends derived from the income of corporations arising out of corporate business transacted in this state or corporate property located in this state. The constitutionality of the tax was upheld as applied to domestic and foreign corporations against the objection that it contravened the Fourteenth Amendment to the Constitution of the United States in that it attempted to impose

a tax beyond the taxing jurisdiction of the state."
 (page 22 of petitioners' brief)

The provisions of Section 3 of Chapter 505, Laws of Wisconsin, 1935, as amended, the tax law involved in the present controversies, so far as here material, read as follows:

"Privilege Dividend Tax. (1) For the privilege of declaring and receiving dividends, out of income derived from property located and business transacted in this state, there is hereby imposed a tax equal to two and one-half per centum of the amount of such dividends declared and paid by all corporations (foreign and local) after the passage and publication of this act and prior to July 1, 1937. Such tax shall be deducted and withheld from such dividends payable to residents and non-residents by the payor corporation.

"(2) Every corporation required to deduct and withhold any tax under this section shall, on or before the last day of the month following the payment of the dividend, make return thereof and pay the tax to the tax commission, reporting such tax on the forms to be prescribed by the tax commission."

For the convenience of the Court, the entire law is printed as an Appendix to this brief.

Petitioners, on page 24 of brief, state:

"The basis of the holding in the case of *State ex rel. Froedtert G. & M. Co., Inc. v. Tax Commission*, (1936) 221 Wis. 225, 265 N. W. 672, 267 N. W. 52, 104 A. L. R. 1478, was as follows:

"(1) The law imposes a tax upon the devolu-

tion or transfer from a corporation to its stock-holders of income earned in the State of Wisconsin;

"(2) The law rests upon the same constitutional basis as laws taxing the devolution of property by death and other comparable laws taxing transfers;

"(3) Corporate earnings in the state of Wisconsin are taxable in Wisconsin, and the law in question merely serves to impose such a tax."

While it is not conceded that the decision in the **Froedtert case** necessarily requires such unqualified conclusions, even assuming petitioners to be correct in the foregoing analysis, it is our contention that the Supreme Court of the State of Wisconsin was incorrect in sustaining Section 3 of Chapter 505, Laws of Wisconsin, as amended, in its original decision, as this law applied to foreign corporations. If we assume that the tax is a tax on the devolution of income earned within the State of Wisconsin, such of itself does not grant jurisdiction of the State of Wisconsin to tax unless the transaction which is attempted to be taxed also takes place within the State of Wisconsin, and the premise assumed in the **Froedtert case** that the law is comparable to tax laws taxing the devolution of property by death, as will hereafter be pointed out, wholly unsound. The mere fact that corporate earnings in the State of Wisconsin are taxable by Wisconsin, and, as a matter of fact had been taxed, under no stretch of the imagination permits the taxation of those earnings in a transaction which takes place wholly outside of the boundaries of the State of Wisconsin. Concededly, the corporate earnings earned in Wisconsin are

taxable in Wisconsin to the corporation, but the tax in question is not a tax on the corporate earnings as such while they are still within the State of Wisconsin, but taxes a transaction which possibly may include corporate earnings which have long since been removed from the State of Wisconsin.

Petitioners' Point B is as follows:

"The Supreme Court of Wisconsin in the case of State ex rel. Froedtert G. & M. Co., Inc. v. Tax Commission, (1936) 221 Wis. 225, 265 N. W. 672, 267 N. W. 52, 104 A. L. R. 1478, correctly applied the Fourteenth Amendment to the United States Constitution, as that amendment is construed by this court, in determining the constitutionality of Section 3 of Chapter 505, Laws of Wisconsin, 1935, as amended."

Under this point petitioners argue that, "since the Wisconsin Supreme Court in **State ex rel. Froedtert G. & M. Co., Inc. v. Tax Commission, (1936) 221 Wis. 225, 265 N. W. 672, 267 N. W. 52, 104 A. L. R. 1478**; sustained the validity of Section 3 of Chapter 505, Laws of Wisconsin, 1935, as amended, upon the theory that its constitutionality was determined by the same principles as apply to a determination of the validity of inheritance or estate taxes, it becomes necessary to determine whether, on the basis of such an analogy, the tax can be sustained under the Fourteenth Amendment to the United States Constitution as interpreted by the decisions of this Court."

Petitioners state:-

"Had the Wisconsin Court in the present case

altered its position as to the construction of the law there would, of course, be no occasion for examining its constitutionality in the light of the analysis made in a prior decision."

We agree with petitioners that in the present case the Wisconsin Supreme Court did not alter its position as to the construction of the law, but did decide that the transaction sought to be taxed was outside the jurisdiction of the State of Wisconsin; and that under the **Connecticut General Life Insurance Company case**, there being no constructive situs within the State of Wisconsin for the taxation of the transaction of declaring and receiving dividends in the State of New York, there is no basis for an excise tax within the State of Wisconsin upon the dividend in question.

Petitioners, in analyzing the decisions of this Court, in which inheritance or estate taxes were involved, claim this Court has announced certain principles, the first of which is as follows:

"(1) Death duties rest upon the principle that death is the "generating source" from which the authority to impose such taxes takes its being, and "it is the power to transmit or the transmission or receipt of property by death which is the subject levied upon by all death duties."***"
(citing cases)

Death is the first step or the generating source from which the taxing authority derives its authority to impose a tax, but standing alone it does not grant to the taxing authority the right to impose death duties. The taxing authority must have some independ-

ent ground on which to predicate jurisdiction to tax, other than death alone. In all of the cases cited by petitioners in their brief the taxing authorities had some tangible independent ground on which to base their jurisdiction to tax, in addition to the original generating source of death.

Tyler v. United States, (1930, 281 U. S. 497, 502, 74 L. ed. 991, 50 S. Ct. 356, sets forth the first principle quoted by petitioners:

In this case this Court had before it the question of the validity of the Revenue Act passed by Congress September 8, 1916, imposing an estate tax upon the gross estate of a decedent. The particular question presented is whether the property owned by husband and wife, as tenants by the entiréty, could be included, without contravening the Constitution, in the gross estate of the decedent spouse for the purpose of computing the tax "upon the transfer of the net estate."

It will be observed that in **Tyler v. United States** there was no question so far as the jurisdiction of Congress is concerned, to tax the particular phase of the estate involved. The United States clearly had jurisdiction over both the property involved and over the individuals involved, and the decision of the court that death "became the generating source of important and definite accessions to the property rights of the other," justifying a tax upon the transfer from the deceased person to the surviving tenant, was obviously correct. In the instant case, however, the original jurisdiction over the transaction is wholly lacking.

The next case cited by petitioners is **Knowlton v.**

Moore, 178 U. S. 41, 56, 57, 44 L. ed. 969, 975, 976, 20 S. Ct. 747, in which this Court had before it the question of the validity of the War Revenue Act of June, 1898, which imposed a tax upon legacies and distributive share of personal property.

The next case cited by petitioners is **New York Trust Company, et al. v. Eisner**, (1921), 256 U. S. 345, 65 L. ed. 963, 41 S. Ct. 506. This involved the constitutionality of the act of Congress of September 8, 1916, imposing a federal estate tax and the failure of this act to permit as a deduction in computing the federal estate tax the amount of state inheritance tax. This Court affirmed the decree upon the authority of **Knowlton v. Moore**. Here again we have a case in which no question of jurisdiction of the United States government over the person of the deceased and his property.

The next case cited by petitioners is **Stebbins v. Riley**, (1925), 268 U. S. 137, 69 L. ed. 884, 45 S. Ct. 424. This case came before this Court to review the determination of the Supreme Court of California upholding the constitutionality of an inheritance tax act of the State of California which permitted no deduction to be made in computing inheritance taxes for the amount of federal estate tax paid to the United States government. This Court affirmed the judgment of the Supreme Court of the State of California. Here again we have a case in which there was no question of jurisdiction of the State of California over the person of the deceased or his property.

Again, in the case of **Snyder v. Bettman**, (1903) 190 U. S. 249, 47 L. ed. 1035, 23 S. Ct. 803, this Court's de-

cision in no way involves jurisdiction to tax. The question involved was the authority of the act of Congress of June 13, 1898, to impose a succession tax upon a bequest to a municipality for public purposes.

In each one of the foregoing cases, the transaction upon which the tax was levied took place within the jurisdiction of the taxing authority and was not dependent upon, nor related to, some other transaction in which the state or the federal government would have no jurisdiction to tax.

Petitioners' second principle is as follows:

"(2) The power to impose transfer, succession, or legacy taxes is not dependent for its existence upon the power to regulate the transmission of property by death or upon the granting of a privilege to transmit or to receive property by death." (citing cases).

Petitioners again cite **Stebbins v. Riley**, (1925) 268 U. S. 137, 69 L. ed. 884, 45 S. Ct. 424; **Snyder v. Bettman**, (1903) 190 U. S. 249, 47 L. ed. 1035, 23 S. Ct. 803; and **Knowlton v. Moore**, (1900) 178 U. S. 41, 44 L. ed. 969, 20 S. Ct. 747—all of which have been analyzed above. We disagree with petitioners that the case of **Snyder v. Bettman**, (1903) 190 U. S. 249, 47 L. ed. 1035, 23 S. Ct. 803, announces any such principle in passing on the right of a state to impose an inheritance or succession tax.

This Court's pronouncement on that question, contained on page 252, had reference to the authority of Congress to impose such a tax, and is as follows:

"This case must be regarded as definitely establishing the doctrine that the power to tax inheritances does not arise solely from the power to regulate the descent of property, but from the general authority to impose taxes upon all property within the jurisdiction of the taxing power. It has usually happened that the power has been exercised by the same government which regulates the succession to the property taxed; but this power is not destroyed by the dual character of our government, or by the fact that, under our Constitution, the devolution of property is determined by the laws of the several states."

This statement is in answer to the claim that Congress lacked the authority to impose a succession tax, because it did not have the power to regulate the descent of property, which power came from the states. In other words, this Court held that the Federal government's right to impose a tax upon the inheritance or succession did not fail because it had no power to regulate the descent of property, but its power came from the general authority to impose taxes upon all property within its jurisdiction, and there was no question about the jurisdiction of the United States over the property involved in that tax.

The case of *Stebbins v. Riley*, (1925) 268 U. S. 137, 69 L. ed. 884, 45 S. Ct. 424, does not state any such principle. It seems to us that these cases are authority for the principle that the power of the state to impose transfer, succession, or legacy taxes is dependent upon the power to regulate the transmission of property by death or upon the granting of a privilege to transmit or to receive property by death, that the taxing

unit has jurisdiction by reason of the domicile of the decedent or by reason of jurisdiction of the property of the decedent within the territorial jurisdiction of the taxing unit.

In the *Stebbins v. Riley* case, on page 145 of the United States Reporter, the Court said:

"There are two elements in every transfer of a decedent's estate: the one is the exercise of the legal power to transmit at death; the other is the privilege of succession. Each, as we have seen, is the subject of taxation."

The "legal power to transmit at death" and the "privilege of succession" are both derived from the state, and the state may tax, if it has jurisdiction over either the deceased person, by reason of domicile, or the property of the deceased person.

The case, *Knowlton v. Moore*, (1900) 178 U. S. 41, 44 L. ed. 969; 20 S. Ct. 747, does not sustain petitioners' second principle. In this case the claim was made that, if the taxes were not direct, they were levies on rights created solely by state law, depending for their continual existence on the consent of the several states, a volition which Congress had no power to control, and as to which it could not, therefore, exercise its taxing authority.

This Court held that Congress' power to impose a transfer, succession, or legacy tax was not dependent for its existence upon the power to regulate the transmission, but upon the general authority granted to Congress to impose taxes on all property within the jurisdiction of its taxing power.

The third principle which petitioners claim this Court has announced is as follows:

"(3). The power of a state to impose a transfer tax is not dependent upon the event of death in that state. None of the cases decided by the court places emphasis upon the place of that event. Neither does the power of a state to tax a transfer depend upon those acts necessary to effectuate the transfer taking place within the state's territorial jurisdiction and pursuant to its laws." (citing cases)

In the case of **Graves v. Elliott**, (1939) 307 U. S. 383, 83 L. ed. 1356, 59 S. Ct. 913, cited by petitioners, the Supreme Court was asked to say whether the State of New York may constitutionally tax the relinquishment at death by a domiciled resident of the State of New York of a power to revoke a trust of intangibles held by a Colorado trustee. This Court held at page 386 of the United States Reporter:

"The essential elements of the question presented here are the same as those considered in No. 339, **Curry v. McCanless**, decided this day (307 U. S. 357, ante, 1339, 50 S. Ct. 900, 123 A. L. R. 162). As is there pointed out, the power of disposition of property is the equivalent of ownership. It is a potential source of wealth and its exercise in the case of intangibles is the appropriate subject of taxation at the place of the domicile of the owner of the power. The relinquishment at death, in consequence of the non-exercise in life, of a power to revoke a trust created by a decedent is likewise an appropriate subject of taxation."

Clearly, the foundation of jurisdiction to tax rested upon the determination that there was a property right subject to the jurisdiction of the State of New York.

The next case cited by petitioners is *Bullen v. Wisconsin*, (1916) 240 U. S. 625, 60 L. ed. 830, 36 S. Ct. 473. In this case this Court had before it the question of the inheritance tax of decedent, a resident of Wisconsin. The Supreme Court of that state affirmed a judgment for a tax upon a fund of nearly a million dollars, which the heirs and next of kin claimed could not be taxed in Wisconsin without violating the Fourteenth Amendment and the contract clause of the Constitution of the United States. The deceased formerly lived in Chicago, and after moving to Wisconsin, he continued to do some business in Chicago. He kept, in Chicago, the bonds, stocks and notes constituting the fund held in that city by trustee. In 1904 he repossessed the fund, but in 1907 he reconveyed the fund upon the former trusts. He died, a resident of Wisconsin, without ever repossessing the fund.

This Court, in affirming the judgment, said (page 631 of the United States Reporter) >

"The power to tax is not limited in the same way as the power to affect the transfer of property. If this fund had passed by intestate succession, it would be recognized that by the traditions of our law the property is regarded as a *universitas* the succession to which is incident to the succession to the *persona* of the deceased. As the states where the property is situated, if governed by the common law, generally recognize the law of the domicile as determining the suc-

cession, it may be said that, in a practical sense at least, the law of the domicile is needed to establish the inheritance. Therefore, the inheritance may be taxed at the place of domicile, whatever the limitations of power over the specific chattels may be, as is especially plain in the case of contracts and stock."

The **Bullen** case establishes nothing whatsoever except that the state of the domicile of the decedent would have the right to tax by reason of the fact that the law of the domicile would have determined the succession of the particular property involved, if it were not for the fact that the instrument executed by Bullen, which was not revoked, determined it in this particular case. The jurisdiction to tax rested upon the non-exercise of the power of appointment which was retained by Bullen.

We agree with petitioners that the cases cited establish the principle that the power of a state to impose a transfer tax is not solely dependent upon death in the state; but we still maintain that it cannot be claimed that these cases sustain petitioners' proposition that the constitutionality of the privilege dividend tax law is to be determined by the same principles as apply to a determination of the validity of inheritance, succession, or estate tax.

The fourth principle which petitioners claim this Court has announced is as follows:

"(4) If a state has jurisdiction to impose a tax upon property, it may impose a tax upon the devolution by death of such property." (citing cases)

The first case cited by petitioners is *Graves v. Elliot*, (1939) 307 U. S. 383, 83 L. ed. 1356, 59 S. Ct. 913, which we have analyzed under petitioners' third principle.

The next case cited is *Curry v. McCanless*, (1939) 307 U. S. 357, 83 L. ed. 1339, 59 S. Ct. 900, in which the question before this Court was whether the States of Alabama and Tennessee could each constitutionally impose death taxes upon the transfer of an interest in intangibles held in trust by an Alabama trustee, but passing under the will of a beneficiary decedent domiciled in Tennessee; and which of the two states could tax in the event that it is determined that only one state could constitutionally impose the tax. The Chancery Court of Tennessee decreed that the State of Alabama could lawfully impose the tax and that the inheritance tax law of Tennessee violated the Fourteenth Amendment insofar as it purported to impose a tax measured by the trust property disposed of by decedent's will. The Supreme Court of Tennessee reversed, and entered its decree declaring the trust property disposed of by decedent's will to be "taxable in Tennessee and not taxable in Alabama for purposes of death succession or transfer taxes."

Alabama had assessed a state inheritance tax on the trust property; no transfer tax had been assessed by the Tennessee taxing officials, but they asserted the right to do so.

The decree of the Supreme Court of Tennessee, denying the right of Alabama to tax, was reversed, in which this Court said at page 369 of the United States Reporter:

"Here, for reasons of her own, the testatrix, although domiciled in Tennessee and -enjoying the benefits of its laws, found it advantageous to create a trust of intangibles in Alabama by vesting legal title to the intangibles and limited powers of control over them in an Alabama trustee. But she also provided that by resort to her power to dispose of property by will, conferred upon her by the law of the domicile, the trust could be terminated and the property pass under the will. She thus created two sets of legal relationships resulting in distinct intangible rights, the one embodied in the legal ownership by the Alabama trustee of the intangibles, the other embodied in the equitable right of the decedent to control the action of the trustee with respect to the trust property and to compel it to pay over to her the income during her life, and in her power to dispose of the property at death."

As we understand the decision of this Court in the case, *Curry v. McCanless*, analyzed above, it was that the inheritance tax imposed by Tennessee and Alabama did not deprive the taxpayer of his property without due process of law in contravention of the Fourteenth Amendment to the Constitution of the United States, because, under the facts, each state had jurisdiction of the subject taxed, namely, intangible rights created by a testator. The right of Alabama grew out of the legal ownership in Alabama of the trustee of the intangibles, which have a business situs in Alabama; the right of Tennessee to tax was based on the right of a domiciled resident to control the action of the trustee with respect to the trust property and to compel the trustee to pay over to the grantor of the trust the income during the grantor's

life and the power retained in the grantor to dispose of the property at death.

In the next case cited by petitioners—**Rhode Island Hospital Trust Co. v. Doughton**, (1926) 270 U. S. 69, 70 L. ed. 475, 46 S. Ct. 256—this Court had before it the question of an assessment for inheritance tax sustained by the Supreme Court of the State of North Carolina on the intangible property of one George Briggs, a resident of Rhode Island and domiciled therein at the time of his death. He never resided in North Carolina. He died testate in October, 1919, leaving a large estate. Among other personal property left by Briggs, and passing to his executors under the will, were shares of stock in the R. J. Reynolds Tobacco Company which with declared dividends unpaid were valued at \$115,634.50. The R. J. Reynolds Tobacco Company is a corporation created under the laws of the State of New Jersey and qualified to do business under the laws of the State of North Carolina. Briggs' certificates of stock in the Tobacco Company, passing under his will to his executor, were none of them in the State of North Carolina at the time of his death, and never had been while they were owned by him. The Commissioner of Revenue of the state assessed an inheritance tax upon \$77,089.67—66 2/3 per cent of the total value of Briggs' stock, amounting to \$2,658.85.

This Court, in reversing the judgment of the Supreme Court of North Carolina, said at page 80 of the United States Reporter:

“The tax here is not upon property, but upon

the right of succession to property, but the principle that the subject to be taxed must be within the jurisdiction of the state applies as well in the case of a transfer tax as in that of a property tax. A state has no power to tax the devolution of the property of a nonresident unless it has jurisdiction of the property devolved or transferred. In the matter of intangibles, like choses in action, shares of stock and bonds, the situs of which is with the owner, a transfer tax of course may be properly levied by the state in which he resides. So, too, it is well established that the state in which a corporation is organized may provide in creating it for the taxation in that state of all its shares, whether owned by residents or nonresidents. ***

***. But whatever the view of the other courts, that of this court is clear, the stockholder does not own the corporate property. Jurisdiction for tax purposes over his share can not, therefore, be made to rest on the situs of part of the corporate property within the taxing state. North Carolina can not control the devolution of New Jersey shares. That is determined by the laws of Rhode Island where the decedent owner lived or by those of New Jersey, because the shares have a situs in the state of incorporation. There is nothing in the statutory conditions on which the Tobacco Company began or continued business in North Carolina which suggests that its shareholders subjected their stock to the taxing jurisdiction of that state by the company's doing business there.

 "We conclude that the statute of North Carolina, above set out, in so far as it attempts to subject the shares of stock in the New Jersey corporation, held by a resident of Rhode Island, to a transfer tax deprives the executor of Briggs

of his property without due process of law and is invalid."

The above case clearly requires that the subject matter which is to be taxed must be within the jurisdiction of the state in order to sustain the assessment of a valid tax. Furthermore, the court specifically held that no power existed in favor of the state to tax devolution of property of a nonresident unless it had jurisdiction of the property devolved or transferred. Applied to the instant case, Wisconsin clearly had no jurisdiction of the earnings of Wisconsin on which it had only paid an income tax in Wisconsin after such earnings were transferred outside the territorial boundaries of the state.

Snyder v. Bettman, (1903) 190 U. S. 249, 47 L. ed. 1035, 23 S. Ct. 803, is the next case cited by petitioners. This case was also cited under petitioners' second principle, and is analyzed under that principle.

The fifth principle which petitioners claim this Court has announced is as follows:

"(5) A state may tax the income of individuals and corporations derived from business transacted and property located in the state." citing cases)

To support this fifth principle petitioners cite **Underwood Typewriter Company v. Chamberlain**, (1920) 254 U. S. 113, 65 L. ed. 165, 41 S. Ct. 45; **Travis v. Yale & Towne Mfg. Co.**, (1920) 252 U. S. 60, 64 L. ed. 460, 40 S. Ct. 228; **Shaffer v. Carter**, (1920) 252 U. S. 37, 64 L. ed. 445, 40 S. Ct. 221; and **United States Glue**

Company v. Oak Creek, (1918) 247 U. S. 321, 62 L. ed. 1135, 38 S. Ct. 499—all of which dealt with the right of the state to impose an income tax upon income earned within the state. These cases, by no stretch of the imagination, can be held to sustain the jurisdiction to tax a transaction merely because the transaction outside of the state may incidentally include income that was earned within the state.

On page 30 of their brief petitioners state that "The application of the analogy drawn by the Wisconsin Supreme Court between the tax here in question and a tax upon transfers by death necessarily results, in view of the foregoing, in establishment of the following propositions:

"“(a) The tax here in question is, as held by the Wisconsin Court, an excise upon the transfer of corporate earnings, which embraces the right to transmit and the right to receive.”

Assuming that the Court so held in its original decision (that the tax was an excise upon the transfer of corporate earnings), it is our claim, and the claim advanced before the Supreme Court of Wisconsin, and now decided by the Supreme Court of Wisconsin in this case, that the right to declare, transmit, and receive all of which takes place outside the State of Wisconsin cannot be taxed.

“(b) The state may tax the transfer notwithstanding the fact that it does not grant the privilege to make the transfer and may not regulate it.”

We disagree with petitioners. The state may not tax the transfer notwithstanding the fact that it does not grant the privilege to make the transfer and may not have the right to regulate it. None of the cases cited by petitioners sustains this principle.

"(c) The fact that dividends may be declared and paid outside the state pursuant to the law of another state does not deprive the state of the power to impose the tax in question."

"(d) If jurisdiction to tax the thing transferred results in jurisdiction to tax the transfer, the State of Wisconsin may tax the devolution to corporate stockholders of corporate income earned in this state."

The answer to this was given by this Court in *Connecticut General Life Insurance Company v. Johnson*, 303 U. S. 77, 82 L. ed. 673, 58 S. Ct. 436. This Court said (page 81 of United States Reporter):

"* * * It follows that such a tax, otherwise unconstitutional, is not converted into a valid exaction merely because the corporation enjoys outside the state economic benefits from transactions within it, which the state might but does not tax, or because the state might tax the transactions which the corporation carries on outside the state if it were induced to carry them on within."

The State of Wisconsin lacks the jurisdiction to tax the thing transferred in this case—namely, dividends; therefore, it lacks the right to impose the tax in question.

On page 31 of their brief, petitioners submit the following question:

"(1) Is the devolution of income from a corporation to its stockholders a proper subject for the imposition of an excise tax?"

To which we reply: We think it is, providing the devolution takes place within the state that is imposing the tax. If, however, the transaction of devolution does not take place within the state, there is no proper subject to tax.

Also on page 31, the question:

"(2) Do the considerations which have been held to justify the imposition of an excise upon the transfer of property resulting from death justify as well the imposition of an excise upon the transfer of corporate income from a corporation to its stockholders?"

And our answer: We think not. The considerations which have been held to justify the imposition of an excise tax upon the transfer of property resulting from death are based on jurisdiction by reason of domicile.

Petitioners conclude under point (b):

"As we have indicated, it is not too much to say that protection of the laws of the state is invoked and given in order to create the subject of the transfer for the purpose of transfer. And the state, since it has jurisdiction to tax the subject of the transfer (citing cases), at the time of transfer, may tax the transfer."

We assume that by "The subject of the transfer" petitioners mean income earned in Wisconsin. We have never contended, nor do we now contend, that the State of Wisconsin did not have authority to tax the income of respondent in Wisconsin; but we do contend that after the income has been removed from the State of Wisconsin, the State lacks jurisdiction to tax the declaration of a dividend out of Wisconsin earnings, the payment of expenses or losses, or any use made of the income outside the State of Wisconsin.

POINT B.

THE WISCONSIN SUPREME COURT PROPERLY HELD THAT THE PRINCIPLES OF LAW ANNOUNCED BY THIS COURT IN THE CASE OF CONNECTICUT GENERAL LIFE INSURANCE COMPANY v. JOHNSON, 303 U. S. 77, 82 L. ed. 673, 58 S. Ct. 436, WERE SQUARELY APPLICABLE TO THE CONSTITUTIONAL QUESTIONS IN THE INSTANT CASE, AND THAT ON THE AUTHORITY OF THAT CASE AND OTHER SETTLED PRINCIPLES OF CONSTITUTIONAL LAW THE WISCONSIN PRIVILEGE DIVIDEND TAX LAW, AS APPLIED TO THE RESPONDENT, WAS UNCONSTITUTIONAL UNDER THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION.

As hereinbefore pointed out, the Wisconsin Supreme Court has conclusively construed the statute in question as imposing an excise tax on the transaction of declaring and receiving dividends out of income derived from property located and business transacted within the State of Wisconsin. As further pointed out, under a long line of decisions of this court such a construction by the state Supreme Court is binding and conclusive upon this court.

This Court recently had under consideration the right of a state to tax transactions which occurred without the state in considering the problems involved in **Connecticut General Life Insurance Company v. Johnson**, 303 U. S. 77, 82 L. ed. 673, 58 S. Ct. 436. The decision of this Court in that case conclusive-

ly holds that a transaction to be taxed must occur within the boundaries of the taxing state. Chief Justice Rosenberry of the Wisconsin Supreme Court, in the opinion rendered in the case of **J. C. Penney Company v. State of Wisconsin and Elmer Barlow, etc.**, 233 Wis. 286, in holding the principles announced in the **Connecticut General Life Insurance Company** case applicable, stated at page 296 of the opinion in the Wisconsin Reporter as follows:

"This determination of the Supreme Court of the United States clearly holds that the fact that a fund which became the subject of a transaction in the state of Connecticut was earned within the state of California and might have been taxed there, does not give the transaction in Connecticut a situs within the state of California for the purposes of taxation. In our view the California case is a stronger case for jurisdiction to tax by a state than is the present case because in that case nothing but insurance premiums paid in California were dealt with and in levying the tax upon the company which did the business in California the amount of the reinsurance premiums was deducted in cases where the reinsurance premium was paid to a company authorized to do business in California. In both cases the thing taxed is a transaction without the state made pursuant to a privilege or right granted by another state measured by the amount of a fund earned in the taxing state. Under the Conn. General Life Ins. Co. case, there being no constructive situs within the state of Wisconsin for the taxation of the transaction of declaring and receiving dividends in the state of New York, there is no basis for an excise tax within the state of Wisconsin upon the dividend in question. Certainly the

payment of a reinsurance premium on business done in the state of California to a company authorized to do business in California is more closely connected to California business than is the declaration of a dividend in the state of New York although that part of the dividend taxed accrued from earnings made in Wisconsin. If there is no situs for taxation purposes in the one case there certainly is not in the other. We are obliged to hold that the transaction of declaring and receiving the dividend in question was not taxable in the state of Wisconsin."

While the nature of the tax involved in the Connecticut General Life Insurance Company case is slightly different from the nature of the tax involved in the instant case, substantively there is no more jurisdiction to tax the transaction involved in the instant case than existed to tax the transaction involved in the Connecticut General Life Insurance Company case. Both alleged taxes were upon transactions which took place wholly outside of the boundaries of the taxing state. We submit that the holding of this Court in the Connecticut General Life Insurance Company case is conclusively authority against the constitutionality of the instant tax law.

1.

Analysis of Petitioners' Points C and D.

Petitioners' Point C reads as follows:

"The Wisconsin Supreme Court in the instant case, while it adhered to the construction of Section 3 of Chapter 505, Laws of Wisconsin, 1935, as amended, laid down in the case of *State ex rel. Froedtert G. & M. Co., Inc. v. Tax Commission*, (1936) 221 Wis. 225, 265 N. W. 672, 267 N. W. 52, 104 A. L. R. 1478, erred in holding that the decision of this Court in *Connecticut General Life Ins. Co. v. Johnson*, (1938) 303 U. S. 77, 82 L. ed. 673, 58 S. Ct. 436, required that the tax be invalidated as beyond the taxing jurisdiction of the State of Wisconsin under the Fourteenth Amendment to the United States Constitution."

Petitioners attempt to make the point that the tax law here involved does not tax any transaction outside the state; that it assumes to lay a tax upon a devolution of income which, for taxable purposes, occurs within the state, and the power to tax the devolution is derived from the same source as the power to tax the income itself; namely, the power to tax Wisconsin earnings.

The only authority cited by petitioners is the dissenting opinion written by Justice Fowler in the instant case, who wrote the original opinion of the Wisconsin Court in *State ex rel. Froedtert G. & M. Co., Inc. v. Tax Commission*, (1936) 221 Wis. 225, 265 N. W. 672, 267 N. W. 52, 104 A. L. R. 1478.

In his dissent, Justice Fowler made the following comments:

*** The object of the California tax was the reinsurance premium received and contracted for in the state of Connecticut. The receipt and the contract were in no way connected with, in no way incidental to any transaction of the insurance company in California, and were in no way connected with or incidental to any earnings of the company from business conducted in California. The object of the instant tax is the declaration of a dividend made in New York on earnings of the plaintiff corporation through business transacted in the state of Wisconsin. The declaration of the instant dividend was connected with, was incidental to, related back to, the business conducted in Wisconsin on the earnings of which the tax was computed. The reason for the invalidity of the California tax does not apply to the instant case. ***

The fallacy of this reasoning seems to be in his holding that the object of the tax is the declaration of a dividend from earnings of the corporation from business transacted in the State of Wisconsin, and the declaration of the dividend was connected with, was incidental to, related back to, the business conducted in Wisconsin on the earnings of which the tax was computed. This seems to be based upon the theory that the State of Wisconsin has power to tax any act performed outside the state in which income earned within the state is used. To illustrate the fallacy of this doctrine:

Suppose A, a resident of Wisconsin, earns \$50,000 income in Wisconsin, pays all taxes levied against it; then lawfully removes his domicile

and money to Minnesota and dies a resident of Minnesota, leaving said \$50,000 on deposit in a Minnesota bank. Upon this theory, that the initial source of the income being Wisconsin, the widow, a resident of Minnesota, the ultimate recipient of the Wisconsin income, through the will of A, would be subject to an inheritance tax in Wisconsin.

To further illustrate the fallacy of the theory that Wisconsin can tax the ultimate recipient of Wisconsin income, would mean that Wisconsin could tax a Chicago merchant because he sold a Wisconsin wage earner goods and accepted in payment thereof the wage earner's Wisconsin pay check. A bank in New York would be subject to a Wisconsin tax because it received interest earned within Wisconsin by a Wisconsin corporation because it was the ultimate recipient of a Wisconsin income.

Under the United States Constitution, business cannot be jeopardized by Wisconsin retaining a constructive trust upon income earned within its borders when lawfully removed therefrom and tax the ultimate recipient thereof.

The Wisconsin Supreme Court, in the case of *J. C. Penney Company v. Wisconsin Tax Commission*, 289 N. W. 677, said (pages 681-682):

"In the Froedtert case we rejected the contention that the tax was a tax on property (221 Wis. at page 235, 265 N. W. 672, 267 N. W. 52, 104 A. L. R. 1478) and rested the right of Wisconsin to

tax the dividend in question on the ground that that part of the dividend taxed having been earned within the state, the transaction of declaring and receiving the dividend had a situs within the state although the transaction took place in another state. In the Connecticut General Life Ins. Co. case, *supra*, the Supreme Court of the United States made the further statement: 'Apart from the facts that appellant was privileged to do business in California, and that the risks reinsured were originally insured against in that state by companies also authorized to do business there, California had no relationship to appellant or to the reinsurance contracts. No act in the course of their formation, performance, or discharge, took place there. The performance of those acts was not dependent upon any privilege or authority granted by it, and California laws afforded to them no protection.'

"The grant by the state of the privilege of doing business there and its consequent authority to tax the privilege do not withdraw from the protection of the due process clause the privilege, which California does not grant, of doing business elsewhere. (Citing) Even though a tax on the privilege of doing business within the state in insuring residents and risks within it may be measured by the premiums collected, including those mailed to the home office without the state (Citing) and though the writing of policies without the state insuring residents and risks within it is taxable because within the granted privilege (Citing), there is no basis for saying that reinsurance which does not run to the original insured, and which from its inception to its termination involves no action taken within California, even the settlement and adjustment of claims, is embraced in any privilege granted by that state. (Citing) All that appellant did in effecting the reinsurance was done without

the state and for its transaction no privilege or license by California was needful. The tax cannot be sustained either as laid on property, business done, or transactions carried on within the state, or as a tax on a privilege granted by the state.' * * *"

POINT C.

THE MERE FACT THAT INCOME ORIGINALLY EARNED AND TAXED IN WISCONSIN IS REMOVED FROM THE STATE OF WISCONSIN AND LATER IS INCLUDED IN A TRANSACTION WHICH OCCURS WHOLLY OUTSIDE OF THE STATE OF WISCONSIN (IN THIS CASE, THE PAYMENT OF A DIVIDEND), CLEARLY DOES NOT GIVE TO THE STATE OF WISCONSIN JURISDICTION TO TAX THE TRANSACTION INVOLVED.

Petitioners' Point D reads as follows:

"The declaration and payment of dividends outside of the State of Wisconsin by a foreign corporation does not itself constitute an event taxable by Wisconsin and the Court below properly so held. Where the income distributed is derived from Wisconsin earnings, however, and thus forms the subject matter of the transfer, the State of Wisconsin acquires jurisdiction to tax the transfer."

Petitioners state that in the case below the Wisconsin Supreme Court, in its analysis as to state jurisdiction, applied the following reasoning:

- (1) The exercise by a foreign corporation without the state of the power to declare and pay a dividend is not in itself taxable by the State of Wisconsin, since

(a) The privilege to declare the dividend is not granted by the State of Wisconsin, and

(b) The physical acts of declaring and paying the dividend do not occur within the territorial limits of Wisconsin.

(2) The fact that a dividend so declared and paid by a foreign corporation is derived from Wisconsin earnings does not empower the state to tax the transfer of such earnings effected by the declaration and payment of said dividend, since this Court had, in substance, so held in **Connecticut General Life Ins. Co. v. Johnson**, (1938) 303 U. S. 77, 82 L. ed. 673, 58 S. Ct. 436.

Petitioners do not disagree with the first proposition. Petitioners admit that the State of Wisconsin may not, as an independent basis of taxation, tax the exercise of a privilege which it does not grant; nor may the State of Wisconsin, as an independent basis of taxation, impose a tax upon a transaction which occurs without its territorial jurisdiction; but they state that the present case does not turn upon any such consideration—that the law here involved does not assume to tax such a privilege granted by the State, as they say was stated by the Court in **State ex rel. Froedtert G. & M. Co., Inc. v. Tax Commission**, (1936) 221 Wis. 225, 230, 265 N. W. 672, 267 N. W. 52, 104 A. L. R. 1478, the tax is laid upon the exercise of a right. Petitioners admit that foreign corporations derive the privilege of declaring and paying dividends from the states of their incorporation.

Petitioners attempt to make a distinction between a tax on a privilege granted by the State and a tax laid upon the exercise of a right. At the outset, we

will concede that a state which grants a privilege may tax that privilege, and the state, at the place where the right is exercised, may tax the right; but, as we understand the decision of the Wisconsin Supreme Court in this case below, the Court held, the exercising by a foreign corporation of a right outside the State of Wisconsin, and not granted by the State of Wisconsin, cannot be taxed by Wisconsin without violating the Fourteenth Amendment to the Constitution of the United States. The Court held that, the exercise by a foreign corporation without the state of the power to declare and pay a dividend is not itself taxable by the State of Wisconsin, because the privilege to declare the dividend is not granted by the State of Wisconsin, and the physical act, or the exercising of the right to declare and pay the dividend did not occur within the territorial limits of the State of Wisconsin.

Petitioners state:

"These cases turn upon the application of a rule which, as we have pointed out, is well established by the decisions of this court, namely, that where property forming the subject of a transfer is taxable by the State, its transfer occurs within the jurisdiction of the State for tax purposes."

We do not agree that this is a correct statement of the rule as laid down by this Court, but, assuming it is correct, we fail to see its application to the tax in the instant case. In the instant case the so-called property which was the subject matter of the transfer

clearly was not, at the time of transfer, taxable by the State of Wisconsin. Petitioners again cite **Underwood Typewriter Company v. Chamberlain**, (1920) 254 U. S. 113, 65 L. ed. 165, 41 S. Ct. 45; **Travis v. Yale & Towne Mfg. Co.** (1920) 252 U. S. 60, 64 L. ed. 460, 40 S. Ct. 228; **Shaffer v. Carter**, (1920) 252 U. S. 37, 64 L. ed. 445, 40 S. Ct. 221; and **United States Glue Company v. Oak Creek**, (1918) 247 U. S. 321, 62 L. ed. 1135, 38 S. Ct. 499. These cases do not sustain petitioners' position that the derivation of income from Wisconsin endow the State with power to tax a transfer of such earnings. It is conceded that as held by this Court, Wisconsin has power to impose an income tax upon respondent's income derived from Wisconsin (Chapter 71, Wisconsin Revised Stats. 1935), and it did impose an income tax. The privilege dividend tax, as was pointed out by the Supreme Court of Wisconsin in its decision in this case below and in the case of **State ex rel. Froedtert G. & M. Co., Inc. v. Tax Commission**, (1936) 221 Wis. 225, 265 N. W. 672, 267 N. W. 52, 104 A. L. R. 1478, was not upon the income of respondent, or its shareholders, but was an excise tax upon the transaction involved. Petitioners, in commenting upon the decision of the Wisconsin Supreme Court in the **Estate of Bullen**, (1910) 143 Wis. 512, 128 N. W. 109, later passed upon by this Court, (1916) 240 U. S. 625, 60 L. ed. 830, 36 S. Ct. 473, and the case of **Graves v. Elliott**, (1939) 307 U. S. 383, 83 L. ed. 1356, 59 S. Ct. 913, said:

"In each of these cases the instrument pursuant to which the property was transferred was

executed without the State that was permitted to impose a transfer tax, and in each case the instrument was executed pursuant to the law of the State of its execution."

We understand the basis of the decisions of this Court in the **Estate of Bullen** to be the tax imposed by Wisconsin, and in **Graves v. Elliott**, the tax imposed by New York and Colorado, was not a tax imposed upon a transfer made at the time the instrument creating the trusts was executed. In the **Bullen case** the transfer was made in Illinois, and made in accordance with the laws of the State of Illinois. In the **Graves case** the transfer was made in Colorado, and made in accordance with the laws of the State of Colorado. The tax in Wisconsin and New York was a tax, at the place of decedent's domicile, upon the relinquishment at death, in consequence of the non-exercise in life of a power to revoke a trust in intangible property created by a decedent.

Earnings of a corporation made in Wisconsin, even though removed from the state, may be subject to an income tax by Wisconsin, but the fact that Wisconsin may tax respondent's income, and did tax it, does not legalize a tax such as we have here, which taxes a transaction which takes place outside the jurisdiction.

We do not understand any decision of this Court in holding, if the income had a situs for tax purposes in one state, any transfer of it in another state would be subject to tax in the state where the income was earned.

Petitioners contend it is not necessary that the

State of Wisconsin measure any tax exacted by the total net income of a corporation, but that the State can measure its exaction by that part of the net income which is distributed to its shareholders; that the fact that a tax is measured by the "amount of dividends declared" cannot be made the basis of a tenable constitutional objection to a tax imposing a tax so measured; that the use of "amount of dividends declared" as the measure of a tax is not only proper, but just and equitable. Measuring of taxes by dividends paid is not new, but is supported by precedent of long standing, Pennsylvania, New York, and the Federal Government.

The New York law, referred to by petitioners, was Chapter 361, Laws of New York, 1881. This tax law was before this Court in Home Insurance Co. v. New York, (1890), 134 U. S. 594, 33 L. ed. 1025, 10 S. Ct. 593. This Court said, at page 599 of the U. S. Reporter:

"The Statute designates it a tax upon the 'corporate franchise or business' of the company, and reference is only made to its capital stock and dividends for the purpose of determining the amount of the tax to be exacted each year."

The New York law used dividends only as a yardstick in measuring the rate of tax—the tax was imposed regardless of whether or not any dividends were paid.

In this case it should be noted that the State of New York had jurisdiction over the subject taxed—namely, the corporate franchise or business, and the State

also granted to the corporation the right to declare dividends. Regardless of the state in which the dividends were declared, if dividends were the subject of the tax, the tax would have been valid.

Sections 182 and 186, Article 9, Chapter 60, Consolidated Laws of the State of New York, referred to by petitioners in their brief, are franchise taxes imposed upon utility companies—the rate being determined by dividends made and declared during the year. This law is still in effect, and, as we understand it, is the same as Chapter 361, Laws of New York, 1881, which was considered by this Court in **Horne Insurance Co. v. New York**, (1890) 134 U. S. 594, 33 L. ed. 1025, 10 S. Ct. 593. This law originally imposed a franchise, or business, tax upon all corporations. Later all corporations, except utility, were excluded from tax under this section, as amended, and were subject to other franchise taxes. This Court sustained this franchise, or business, tax assessed against a foreign corporation doing business pursuant to the authority granted by the State of New York in the case of **Horn Silver Mining Co. v. New York**, (1892) 143 U. S. 305, 36 L. ed. 164, 12 S. Ct. 403.

It is clear that the State of New York had jurisdiction of the subject taxed—namely, the franchise granted by the State of New York to the foreign corporation, or the business transacted within its borders by this corporation. As pointed out by petitioners on page 53 of their brief, Pennsylvania has imposed a franchise tax upon corporations to be computed at the rate of one-half mill upon the capital stock for each 1 per cent of dividends made or declared

during the year, but if no dividends were made or declared during the year, or if the dividends made or declared were less than 6 per cent of the capital stock, the capital was to be appraised and taxed at three mills upon each dollar of valuation. Here again we have a tax upon a franchise or privilege in which the only part the dividends play is the yardstick to measure the rate, and the tax does not fail if no dividends are declared, the corporation is still subject to tax.

The Act of Congress of 1864, as amended, which petitioners refer to, reads as follows (the pertinent provisions):

"Any such company that may have declared any dividend in scrip or money, due or payable to its stockholders, including non-residents, whether citizens or aliens, as part of the earnings, profits, income, or gains of such company, and all profits of such company, carried to the account of any fund, or used for construction, shall be subject to and pay a tax of 5 per centum on the amount of all such interest or coupons, dividends, or profits, whenever and wherever the same shall be payable, and to whatsoever party or person the same may be payable, including non-residents, whether citizens or aliens." (Page 301, 84 U. S.)

This Court first considered this statute in **Barnes v. The Railroad**, (1873) 17 Wall. (84 U. S.) 294, 21 L. ed. 544, and in **Bailey v. N. Y. C. & H. R. R. Co.**, (1875) 22 Wall. (89 U. S.) 604, 22 L. ed. 840; but not upon any constitutional objection, but to determine if the act applied to certain transactions.

In Railroad Co. v. Collector (1879) 10 Otto (100 U.

S.) 595, 25 L. ed. 647, this Court passed upon the constitutionality of the act. The Court, on page 598, said:

"The tax, in our opinion, is essentially an excise on the business of the class of corporations mentioned in the statute. The section is a part of the system of taxing incomes, earnings and profits adopted during the late war, and abandoned as soon after that war was ended as it could be done safely. The corporations mentioned in this section are those engaged in furnishing road-ways and water-ways for the transportation of persons and property, and the manifest purpose of the law was to levy the tax on the net earnings of such companies. How were these 'earnings, profits, incomes or gains' to be most certainly ascertained? In every well conducted corporation of this character these profits were disposed of in one of four methods, namely: distributed to its stockholders as dividends, used in construction of its roads or canals, paid out for interest on its funded debts, or carried to a reserve or other fund remaining in the hands of the Company. Looking to these modes of distribution as the surest evidence of the earnings which Congress intended to tax, and as less liable to evasion than any other, the tax is imposed upon all of them."

The Act of Congress of 1864, cited by petitioners and analyzed herein, was not a tax upon dividends as held by this Court, but was an excise tax on the transaction of business by a corporation. The excise tax was measured by the net income of the corporation.

Instead of stating that the net income consisted of the gross income less business deductions, Congress, in arriving at the net income, did so by four

methods, namely: (1) distributions to stockholders as dividends, (2) plus amounts used in construction of roadbeds and canals, or improvements, (3) plus amounts paid out for interest on its funded debts, (4) the amount carried to a reserve or other fund remaining in the hands of the company. In short, this adds up to using the net income to measure the tax.

These cases are apparently cited by petitioners to sustain their contention that it is not necessary that the state measure any tax exacted by the total net income of the corporation but the tax can be measured by that part of the income which is distributed to shareholders. We agree with petitioners that if the State of Wisconsin has jurisdiction of the subject of the tax that it may do so, but we do not agree that the tax involved in these cases was upon dividends. The tax involved was upon the corporate franchise of business and was a tax upon the corporation regardless of whether or not a dividend was made or declared.

The Act of Congress of 1864, above referred to, like Chapter 361, Laws of New York 1881, and the Pennsylvania Laws referred to by petitioners on page 53 of their brief, does not depend for its existence upon any declaration of a dividend. The tax under the Act of Congress of 1864 would be the same even though the corporation failed to declare a dividend. In that case the net income would be arrived at by taking the amount paid out for construction plus interest plus amount carried to reserve and held by the company.

On page 55 of petitioners' brief they state the most

recent federal tax measured by dividends is the Act of Congress of June 16, 1933, known as the National Industrial Recovery Act, Chapter 90, Section 213 (a) (48 Stats. at Large, pt. 1, page 206), the pertinent provision of which reads as follows:

"213(a). There is hereby imposed upon the receipt of dividends (required to be included in the gross income of the recipient under the provisions of the Revenue Act of 1932) by any person other than a domestic corporation, an excise tax equal to 5 percentum of the amount thereof, such tax to be deducted and withheld from such dividends by the payor corporation."

This tax was an excise tax upon each recipient of dividends other than domestic corporations, and was a tax upon stockholders and not upon the payor corporation. The General Counsel, Bureau of Internal Revenue, so held when he issued the following ruling which is reported in Cumulative Bulletin XII-2-39-6419 and is known as G. C. M. 12206:

"Where a corporation pays the excise tax on dividends paid by it to its stockholders, the amount of such tax constitutes an additional dividend. The withholding liability of the payor corporation must be computed upon the dividend plus such tax. The stockholders are required to report the dividend plus the tax in gross income and may claim a deduction for the tax paid at the source."

Petitioners, in conclusion, contend, as they contended in their petition for certiorari, that under the

decision of **Barnes v. The Railroad**, (1873) 17 Wall. (84 U. S.) 294, 21 L. ed. 544, and under the decision of **Railroad Co. v. Collector**, (1879) Otto (100 U. S.) 595, 25 L. ed. 647, that the tax in question is one in substance imposed upon the corporation required to pay it.

The case of **Barnes v. The Railroad**, as previously pointed out, does not sustain petitioners' contention that the tax is one imposed upon the corporation because it is required to withhold and collect it. At page 301 this Court said:

"Stripped of every difficulty of that kind as the case confessedly is the great central question which arises is, what did the law makers mean when they enacted that 'any such company that may have declared any dividend in scrip or money, due or payable to its stockholders, including non-residents, whether citizens or aliens, as part of the earnings, profits, income, or gains of such company, and all profits of such company carried to the account of any fund or used for construction, shall be subject to and pay a tax of 5 per centum on the amount of all such interest or coupons, dividends, or profits, whenever and wherever the same shall be payable * * *'"

As previously pointed out, the tax in question was a tax upon the corporation and not upon the shareholders and accrued and was due from the Railroad Company regardless of whether a dividend was made or paid, where, in the instant case, no tax was due or accrued to the State of Wisconsin until a dividend was declared and paid.

In the case of **Railroad Company v. Collector**, the

constitutionality of the law in question was before this Court, and this Court held that it was an excise tax upon the corporation's business measured by income, and the tax accrued regardless of whether a dividend had been paid or not; that the amount of dividends was only one of the yardsticks used by Congress to measure the amount of the income of the corporation.

The tax in the instant case is a tax upon the stockholders and not upon the corporation. The intent of the legislature was to impose a tax on stockholders. This clearly appears from the statute, which provides as follows:

“Such tax shall be deducted and withheld from such dividends payable to residents and non-residents by the payor corporation.”

The ruling of the Federal Treasury Department Bureau of Internal Revenue, I. T. 3002 XV-35-8264 (page 4), held that the Wisconsin privilege dividend tax is an excise tax imposed upon the stockholder receiving the dividend.

In the case of **State ex rel. Sallie F. Moon Co. v. Tax Commission**, 166 Wis. 287, 163 N. W. 639, 165 N. W. 470, it was said at page 293 of the Wisconsin Reporter in the concurring opinion of Chief Justice Winslow:

“* * * when dividends are declared out of them, such dividends become in every proper sense income in the hands of the stockholders.”

The court, by construing the tax to be on the cor-

poration, would be disregarding and thwarting the manifest legislative intent.

In the case of **Heiner v. Donnan**, 285 U. S. 312, 76 L. ed. 772, 52 S. Ct. 358, the United States Supreme Court laid down the following rule at page 331 of the United States Reporter:

“* * * For this court to do so would be to enact a law under the pretense of construing one, and thus pronounce itself guilty of a flagrant perversion of the judicial power.”

In the recent case of **Colorado National Bank v. Bedford**, (1940) 60 S. Ct. 800, 84 L. ed. 730, this Court had before it the Colorado Sales and Service Tax Act, which, it was claimed, imposed a tax upon a National Bank in violation of law. This Court—in holding the tax to be on the bank’s lessee and not upon the bank—said:

“The person liable for the tax, primarily, cannot always be said to be the real taxpayer. The taxpayer is the person ultimately liable for the tax itself. The funds which were received by the State came from the assets of the user, not from those of the federal instrumentality, the bank. The Colorado Supreme Court holds the user is the taxpayer. The determination of the state court as to the incidence of the tax has great weight with us and, when it follows logically the language of the act, as here, is controlling. As the user directly furnishes the funds for the tax, not as an ultimate consumer with a transferred burden but by Section 12 of the act as the responsible obligor, we conclude the tax is upon him not upon the bank. The Constitution or laws of the United States do not forbid such a tax”

This court has determined in several other analogous cases that the tax is against the party who is ultimately burdened therewith.

United States v. Baltimore & Ohio R. R. Co., 84 U. S. 322, 21 L. ed. 597.

Home Savings Bank v Des Moines, 205 U. S. 503, 27 S. Ct. 571.

Merchants' & Manufacturers' Nat. Bank of Pittsburgh v. Commonwealth of Pennsylvania, 167 U. S. 461, 17 S. Ct. 829.

Des Moines Nat. Bank v. Fairweather, 263 U. S. 103, 44 S. Ct. 23.

United States v. Commissioners of Sinking Fund, 169 U. S. 249, 18 S. Ct. 358.

Heiner v. Donnan, 285 U. S. 312, 52 S. Ct. 358.

Oliver v. Washington Mills, (Mass.), 11 Allen 268.

First National Bank v. Chehalis, 166 U. S. 440, 17 S. Ct. 629.

First National Bank v. Kentucky, 9 Wall. 468.

It is further well settled law that the property of a corporation is not property of the stockholders and that the property interests of the corporation and of the stockholders are separate and distinct.

Eisner v. Macomber, 252 U. S. 189, 64 L. ed. 521, 40 S. Ct. 189.

First National Bank of Boston v. Maine, 284 U. S. 312, 76 L. ed. 313, 52 S. Ct. 174.

Rhode Island Hospital Trust Co. v. Doughton, 270 U. S. 69, 70 L. ed. 475, 46 S. Ct. 256.

Beidler, et al v. South Carolina Tax Commission, 282 U. S 1, 75 L. ed. 131, 51 S. Ct. 54.

Klein v. Board of Supervisors, 282 U. S. 19, 75 L. ed. 140, 51 S. Ct. 15.

Owensboro National Bank v. Owensboro, 173 U. S. 664, 43 L. ed. 851, 19 S. Ct. 537.

Estate of Shepard, 184 Wis. 88, 197 N. W. 344.

The property of the corporation is not the property of the stockholders. The Supreme Court of the United States has declared that the property of the shareholders, their respective shares, is distinct from the corporate property, franchises and capital stock. The corporation and its stockholders are separate entities.

The cases cited by petitioners involved taxes which were held to be taxes against corporations rather than against the stockholders, and have no application to the controversy involved in the instant case.

Wisconsin has no power to impose an income tax on dividends received by non-residents from a foreign corporation, which does business in Wisconsin. The corporation and its stockholders are separate and distinct entities, and the stockholders have no legal title to the property held in the name of the corporation or the income made by said corporation in Wisconsin, and the non-resident does not transact business within Wisconsin merely because he happens to own stock in a foreign corporation which does business in Wisconsin. The business carried on by the corporate entity constitutes the business of the corporation and not the business of the individual stockholders. A tax against the corporation does not constitute a tax against the stockholders. The power to tax the corporate entity does not include the power to tax the non-resident stockholder entity.

West v. Tax Commission, 207 Wis. 557, 242 N. W. 165.

Oliver v. Washington Mills (Mass.) 11 Allen 268.

**Cleveland, Painesville & Ashtabula R. R. Co. v.
Pennsylvania, 15 Wall. 300, 326, 21 L. ed. 179,
186.**

**Domenech v. United Porto Rican Sugar Co., 62
Fed. (2d) 552 (Certiorari denied 289 U. S. 739,
53 S. Ct. 656).**

POINT D.

THE DECISION RENDERED BY THE SUPREME COURT OF THE STATE OF WISCONSIN IN THE INSTANT CASE, PROPERLY APPLIED THE RELEVANT PROVISIONS OF THE CONSTITUTION OF THE UNITED STATES AND PROPERLY CONSTRUED AND APPLIED THE DECISIONS OF THIS COURT WITH RESPECT TO JURISDICTION OF THE STATE OF WISCONSIN TO LEVY THE TAX IN QUESTION.

The decision of the Supreme Court of the State of Wisconsin in the instant case, to the effect that no jurisdiction to tax existed because the transaction taxed occurred wholly outside of the boundaries of the State of Wisconsin, is clearly in accordance with repeated pronouncements of this Court.

In **Connecticut General Life Insurance Company v. Johnson** (1938) 303 U. S. 77, 58 S. Ct. 436, 82 L. ed. 673, this Court stated at page 80 of the U. S. Reporter:

**** Hence it is that a state which controls the property and activities within its boundaries of a foreign corporation admitted to do business there may tax them. But the due process clause denies to the State power to tax or regulate the corporation's property and activities elsewhere. *** It follows that such a tax, otherwise unconstitutional, is not converted into a valid exaction merely because the corporation enjoys outside the state economic benefits from transactions within it, which the state might but does not tax, or because the state might tax the transactions

which the corporation carries on outside the state if it were induced to carry them on within."

The decision of this Court in the **Connecticut General Life Insurance Company** case is in line with a long series of decisions of this Court denying jurisdiction to tax on any such theory as petitioners attempt to urge in the instant case.

Provident Savings Life Assurance Society v. Kentucky, (1915) 239 U. S. 103, 36 S. Ct. 34.

Beidler v. South Carolina Tax Commission, 282 U. S. 1, 51 S. Ct. 54.

James v. Dravo Contracting Company (1937) 302 U. S. 134, 58 S. Ct. 208.

Rhode Island Hospital Trust Company v. Doughton (1926) 270 U. S. 69, 46 S. Ct. 256.

Wachovia Bank & Trust Company v. Doughton (1926) 272 U. S. 567, 47 S. Ct. 202.

Farmers Loan & Trust Company v. Minnesota (1930) 280 U. S. 240, 50 S. Ct. 98.

Baldwin v. Missouri, 281 U. S. 586, 50 S. Ct. 436.

The decision of the Supreme Court of Wisconsin in the present case is wholly consistent with the decisions of this Court. The foundation for the decision of the Supreme Court of Wisconsin rested upon no novel grounds, but on settled fundamental principles of constitutional law. The efforts of counsel for petitioners in an attempt to avoid its force, with tenuous arguments to establish constructive situs, are, we submit, without foundation either upon principle or upon authority.

POINT E.

THE TAX LAW IN QUESTION IS UNCONSTITUTIONAL NOT ONLY UNDER THE FOURTEENTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES, BUT IS UNCONSTITUTIONAL UNDER SEVERAL OTHER PROVISIONS OF THE CONSTITUTION OF THE UNITED STATES.

The tax law in question is, in the opinion of counsel for the respondent, vulnerable under several other federal constitutional grounds in addition to that which the Supreme Court of the State of Wisconsin said fit to adopt.

These additional constitutional grounds were properly urged before the Wisconsin Supreme Court but the court did not consider them in view of its determination that the tax was invalid as applied to the respondent, because the acts of the respondent which the tax attempted to reach were beyond the jurisdiction of the State of Wisconsin. There is summarily stated herein, however, various additional constitutional grounds, in addition to that relied upon by the Supreme Court of the State of Wisconsin, under which respondent contends that the law in question is unconstitutional as applied to it.

(1) The Tax Impairs Respondents obligation on its contract with its stockholders, and accordingly is unconstitutional and void under Article 1, Section 10, Constitution of the United States, and Article 1, Section 12, Constitution of the State of Wisconsin.

The respondent cited the following cases and statutes in support of its position:

Federal Constitution, Section 10, Article I.

Wisconsin Constitution, Section 12, Article I.

Dartmouth College v. Woodward, 4 Wheat. 518,
4 L. ed. 629.

**State ex rel. Cleary v. Hopkins Street Building
& Loan Assn.**, 217 Wis. 179, 257 N. W. 684.

**Continental Insurance Co. v. Minneapolis, Saint
Paul & Sault Ste. Marie Railway Co.**, 290 Fed.
87, 31 A. L. R. 1320, certiorari denied, 263 U. S.
703.

Federal Mining & Smelting Co. v. Wittenberg, 15
Del. Ch. 409, 138 Atl. 347.

Peters v. United States Mortgage Co., 114 Atl.
598.

**Delaware Incorporation Act, Revised Code of
Delaware, Section 34.**

Wittenberg v. Federal Mining & Smelting Co.,
138 Atl. 347, 352.

Hooper v. Tax Commission of Wisconsin, et al.,
284 U. S. 206, 52 S. Ct. 120.

Bailey v. New York Cent. & H. R. R. Co., 106 U. S.
109, 1 S. Ct. 62.

Wisconsin Privilege Dividend Law, Sec. 4.

**Fletcher, Cyc. Corp., Vol. 11, (Perm. Ed.) Sec.
5322, page 786.**

**7 Thompson on Corporations (3rd Ed.), Sec. 5308,
page 1831, et seq.**

Beidler v. South Carolina Tax Commission, 282 U.
S. 1, 51 S. Ct. 54.

State Tax on Foreign-held Bonds, 15 Wall. 300, 21 L. ed. 179.

First National Bank of Boston v. Maine, 284 U. S. 312, 52 S. Ct. 174.

New York L. E. & W. R. Co. v. Pennsylvania, 153 U. S. 628, 38 L. ed. 846, 14 S. Ct. 952.

(2) This tax is unconstitutional under Article IV, Section 1 of the Constitution of the United States, because it fails to give full faith and credit to the public acts of Delaware.

The respondent cited the following cases and statutes in support of its position:

U. S. Constitution, Article 4, Section 1.

Bradford Electric Light Co. v. Clapper, 286 U. S. 145, 52 S. Ct. 571.

Modern Woodmen of America v. Mixer, 267 U. S. 544, 45 S. Ct. 389.

Supreme Council of the Royal Arcanum v. Green, 237 U. S. 531, 35 S. Ct. 724.

(3) The law in question imposes a tax on interstate commerce and, consequently is unconstitutional under Article I Section 8 of the Constitution of the United States.

The respondent cited the following cases and statutes in support of its position:

Wisconsin Session Laws of 1935, Sec. 3, Ch. 505.

International Text-Book Co. v. Pigg, 217 U. S. 91,
30 S. Ct. 481.

Norfolk & Western Railway Co. v. John R. Sims,
191 U. S. 441, 24 S. Ct. 151.

**Alpha Portland Cement Co. v. Commonwealth of
Massachusetts**, 268 U. S. 203.

(4) The law as applied to the respondent is unconstitutional under Article I, Section 8 of the Constitution of the United States, in that it taxes federal instrumentalities.

The respondent cited the following cases and statutes in support of its position:

Macallen Co. v. Commonwealth of Massachusetts,
279 U. S. 620, 49 S. Ct. 432.

Miller v. City of Milwaukee, 272 U. S. 713, 47 S. Ct. 280.

Northwestern Mut. Life Ins. Co. v. Wisconsin, 275 U. S. 136, 48 S. Ct. 55.

Home Savings Bank v. Des Moines, 205 U. S. 503, 27 S. Ct. 571.

Schuylkill Trust Co. v. Commonwealth of Pennsylvania, 296 U. S. 113, 56 S. Ct. 31.

State of Missouri v. Gehner, 281 U. S. 313, 50 S. Ct. 326.

National Life Ins. Co. v. United States, 277 U. S. 508, 48 S. Ct. 591.

Laws of Wisconsin of 1935, Ch. 505, Sec. 3, Subdiv. 5.

Revised Statutes of Wisconsin, Sec. 71.25 (2).

(5) The law is unconstitutional because it denies the respondent the equal protection of the laws and is violative of Section 1 of the Fourteenth Amendment to the Constitution of the United States and Article I, Section 1 of the Constitution of the State of Wisconsin, and further is unconstitutional under Article VIII, Section 1 of the Constitution of the State of Wisconsin, Because the tax is not uniform.

The respondent cited the following cases and statutes in support of its position:

Louisville Gas & Electric Co. v. Coleman, 277 U. S. 32, 48 S. Ct. 423.

Hanover Fire Ins. Co. v. Carr, 272 U. S. 494, 47 S. Ct. 179.

Hopkins v. Southern California Tel. Co., 275 U. S. 393, 48 S. Ct. 180.

Concordia Fire Ins. Co. v. Illinois, 292 U. S. 535, 54 S. Ct. 830.

Quaker City Cab Co. v. Pennsylvania, 277 U. S. 389, 48 S. Ct. 553.

CONCLUSION.

It is respectfully submitted that the State of Wisconsin had no jurisdiction to impose a tax on the dividends declared by respondent outside of the State of Wisconsin, and that under settled rules of constitutional law, as determined by this Court, the decision of the Wisconsin Supreme Court to the effect that no jurisdiction to tax such dividends existed is correct, and accordingly the judgment of that court should be affirmed.

Respectfully submitted,
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APPENDIX.

Section 3, Chapter 505, Laws of Wisconsin, 1935, Effective On Its Publication on September 26, 1935, and as Amended by Chapter 552, Laws of Wisconsin, 1935, Effective on Its Publication on October 8, 1935, Provides:

"Section 3. Privilege Dividend Tax. (1) For the privilege of declaring and receiving dividends, out of income derived from property located and business transacted in this state, there is hereby imposed a tax equal to two and one-half per centum of the amount of such dividends declared and paid by all corporations (foreign and local) after the passage and publication of this act and prior to July 1, 1937. Such tax shall be deducted and withheld from such dividends payable to residents and non-residents by the payor corporation.

"(2) Every corporation required to deduct and withhold any tax under this section shall, on or before the last day of the month following the payment of the dividend, make return thereof and pay the tax to the tax commission, reporting such tax on the forms to be prescribed by the tax commission.

"(3) Every such corporation hereby made liable for such tax, shall deduct the amount of such tax from the dividends so declared.

"(4) In the case of corporations doing business within and without the State of Wisconsin, such tax shall apply only to dividends declared and paid out of income derived from business transacted and property located within the State of

Wisconsin. The amount of income attributable to this state shall be computed in accordance with the provisions of chapter 71. In the absence of proof to the contrary, such dividends shall be presumed to have been paid out of earnings of such corporation attributable to Wisconsin under the provisions of chapter 71, for the year immediately preceding the payment of such dividend. If a corporation had a loss for the year prior to the payment of the dividend, the tax commission shall upon application, determine the portion of such dividend paid out of corporate surplus and undivided profits derived from business transacted and property located within the state.

“(5) Dividends paid by a subsidiary corporation to its parent shall not be subject to the tax herein imposed provided that the subsidiary and its parent report their income for taxation under the provisions of chapter 71 on a consolidated income return basis, or both corporations report separately.

“(6) The provisions of this section shall not apply to dividends declared and paid by a Wisconsin corporation out of its income which it has reported for taxation under the provisions of chapter 71, to the extent that the business of such corporation consists in the receipts of dividends from which a privilege dividend tax has been deducted and withheld and the distribution thereof to its stockholders.

“(7) For the purposes of this section, dividends shall be defined as in section 71.02, except that the tax herein imposed shall not apply to stock dividends or liquidating dividends.

“(8) The tax hereby levied, if not paid within the time herein provided, shall become delinquent and when delinquent shall be subject to a penalty

of two per cent on the amount of the tax and interest at the rate of one-half per cent per month until paid.

"(9) The tax hereby imposed shall, when collected by the tax commission, be paid by it into the state treasury."

(Note: The same provisions are now contained, with some additions, in the present Wisconsin tax laws. See Section 71.60, Wis. Stats. 1939.

Chap. 309, Sec. 3, Laws of Wisconsin, 1937, extended its date of applicability to July 1, 1939.

Chap. 198, Sec. 1, Laws of Wisconsin, 1939, extended its date of applicability to July 1, 1941, and increased the rate of tax to 3 per cent.)

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IN THE

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Supreme Court of the United States

October Term, 1940

No. 48

STATE OF WISCONSIN and ELMER E. BARLOW, as Commissioner of Taxation of the State of Wisconsin,
Petitioners,

vs.
MINNESOTA MINING AND MANUFACTURING COMPANY, a Delaware Corporation,
Respondent.

PETITION OF RESPONDENT FOR REHEARING.

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vs.

MINNESOTA MINING AND MANUFACTURING COMPANY, a Delaware Corporation,

Respondent.

PETITION FOR REHEARING.

Now comes the above named, Minnesota Mining and Manufacturing Company, and presents this, its petition for a rehearing of the above entitled cause, and in support thereof, respectfully shows:

I.

JURISDICTION.

This case was argued November 20, 1940; decided and judgment entered December 16, 1940. The time for filing a petition for a rehearing, under the rules of this Court (Rule No. 33), has not been shortened or enlarged, and

will expire January 10, 1941. This petition for rehearing is presented before January 10, 1941.

II.

REASONS FOR PETITION FOR REHEARING.

a. The Supreme Court of the State of Wisconsin, in the case of *Froedtert G. & M. Company, Inc. v. Tax Commission*, 221 Wisc. 225, 265 N. W. 672, and in the case of *J. C. Penny Company v. Tax Commission*, 233 Wisc. 286, 289 N. W. 677, held the tax to be an excise tax upon a privilege.

b. The Attorney General, who represented the State of Wisconsin, and Elmer E. Barlow conceded in their argument and in the brief that this tax was an excise tax upon a privilege or a transaction.

c. In the majority opinion (*Wisconsin v. J. C. Penny Company*), this Court held that the practical operation of Section 3, Chapter 505, Laws of Wisconsin, 1935, as amended by Chapter 552, Laws of Wisconsin, 1935, is to impose an additional tax on corporate earnings within Wisconsin but to postpone the liability for this tax until such earnings are paid out in dividends. In a word, by its general income tax, Wisconsin taxed corporate income that is taken in; but the privilege dividend tax of 1935 superimposed upon this income tax a tax on corporate income that is paid out.

d. The Minnesota Mining and Manufacturing Company, the petitioner herein, has had no opportunity to present to this Court, either by argument or brief, the following views:

1. The tax imposed by the State of Wisconsin is not an additional income tax upon a corporation.

The majority opinion on page 249 reviews the history of the income tax law in Wisconsin as it applied to corporate dividends. The first income tax law enacted in the State of Wisconsin was Chapter 658, Laws of Wisconsin of 1911. A special Wisconsin feature was the exemption of dividends from personal taxation. This so-called "special Wisconsin feature" for years has applied to an individual Wisconsin taxpayer if, and only if, the corporation declaring the dividend had its principle business attributable to Wisconsin; that is, if 50 percent or more of the entire net income of the corporation were used in computing the average taxable income of the corporation under the Wisconsin income tax law. For many years, and at the present time, dividends from corporations—foreign or domestic—paid to Wisconsin stockholders which do not have 50 percent of their business attributable to Wisconsin are taxed for normal income tax purposes.

The case, *Welch v. Henry*, 305 U. S. 134, referred to in the majority opinion, involved an emergency surtax which taxed corporate dividends received by individual resident stockholders even though the principle business of the corporation declaring the dividends was attributable to Wisconsin within the meaning of the income tax law. The dividends from foreign corporations (which, in the great bulk of instances, did not have 50 percent of their business attributable to Wisconsin) were taxed for income tax purposes upon receipt thereof, upon Wisconsin residents; while, in the great bulk of cases, Wisconsin domestic corporations (which, in the great bulk of cases, would have 50 percent or more of their business

attributable to Wisconsin) were not taxed by virtue of the exemption; however, there was no blanket exemption of all dividends from taxation within the State of Wisconsin, as inferred in the majority opinion. In other words, the exemption from tax of dividends, referred to in the majority opinion, was for dividends received in the bulk of cases from local corporations and not from foreign corporations.

Wisconsin has had a longer experience in enacting and collecting income taxes, both on individuals and corporations, than the Federal Government; and in the past has had no particular difficulty in enacting legislation which tax individuals but not corporations; or, tax corporations and not individuals. In this connection, in 1921 the legislature of the State of Minnesota imposed an additional income tax upon corporations doing business in the State of Wisconsin. This is Chapter 459, Laws of Wisconsin, 1921, Section 71.26(2). From a review of the history of income tax and the different statutes enacted imposing taxes upon corporations and individuals and particularly with reference to a tax upon dividends received by residents regardless of the source, it is apparent that Wisconsin, when it enacted the privilege dividend tax law, was adopting a novel procedure to tax dividends received by a resident of a state other than Wisconsin (which it concededly could not do).

2. The tax, whether an excise or an income tax, is a tax upon a stockholder. This Court on April 22, 1940, in unanimous opinion in the case of *Colorado National Bank v. Bedford*, 310 U. S. 40, 84 L. ed. 1067, speaking through Mr. Justice Reed, said:

"The person liable for the tax, primarily, cannot always be said to be the real taxpayer. The ~~taxpayer~~ is the person ultimately liable for the tax itself. The funds which were received by the State came from the assets of the user, not from those of the federal instrumentality, the bank. The Colorado Supreme Court holds the user is the taxpayer. The determination of the state court as to the incidence of the tax has great weight with us and, when it follows logically the language of the act, as here, is controlling. As the user directly furnishes the funds for the tax, not as an ultimate consumer with a transferred burden but by Section 12 of the act as the responsible obligor, we conclude the tax is upon him not upon the bank. The Constitution or laws of the United States do not forbid such a tax."

This Court has determined in several other analogous cases that the tax is against the party who is ultimately burdened therewith.

United States v. Baltimore & Ohio R. R. Co., 84 U. S. 322, 21 L. ed. 597.

Home Savings Bank v. Des Moines, 205 U. S. 503, 27 S. Ct. 571.

Merchants' & Manufacturers' Nat. Bank of Pittsburgh v. Commonwealth of Pennsylvania, 167 U. S. 461, 17 S. Ct. 829.

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United States v. Commissioners of Sinking Fund, 169 U. S. 249, 18 S. Ct. 358.

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Oliver v. Washington Mills, (Mass.), 11 Allen 268.

First National Bank v. Chehalis, 166 U. S. 440, 17 S. Ct. 629.

First National Bank v. Kentucky, 9 Wall. 468.

3. If the tax is an income tax (which is not conceded), it is an income tax upon the stockholder and violates the due process clause of the Fourteenth Amendment to the Federal Constitution.

4. If it is an income tax, either upon the corporation or the stockholder, it is retroactive and void as it violates the due process clause of the Fourteenth Amendment to the Federal Constitution.

The statute provides that dividends shall be presumed to have been paid out of earnings of the payor corporation attributable to Wisconsin under the provisions of Section 71 for the year immediately preceding the payment of the dividends, and if the corporation had a loss for the year prior to the payment of the dividends, the Tax Commission is authorized to determine the portion of the dividends paid out of corporate surplus and the profits derived from business transacted and property located within the State of Wisconsin.

If this tax is to be classed as an additional income tax upon a corporation, the unconstitutional retroactive features of it may be best illustrated by the following example:

The A corporation, doing business in Wisconsin, had net earnings in 1930 from Wisconsin equal to 10 percent of its total earnings. It paid no dividends in 1930, nor in any year until 1939. It had no income for the years 1931 to 1938, both inclusive. On January 2, 1939, it

paid a dividend under the law; 10 percent of this dividend would be subject to the Wisconsin Privilege Dividend Tax at the rate of 2½ percent in 1939, which, according to the majority opinion, is an additional income tax upon the corporation for the year 1930. Here we have a situation where an event taking place in 1939 subjects a corporation's income for 1930 to an additional tax. Such a retroactive tax is void. (*Nichols v. Coolidge*, 274 U. S. 531, 71 L. ed. 1184.)

5. The tax, if an additional income tax upon a corporation, denies the corporation the equal protection of the laws in violation of the Fourteenth Amendment to the Federal Constitution. (*Colgate v. Harvey*, 296 U. S. 403, 80 L. ed. 299.)

The privilege dividend tax law in question imposed a tax on "such dividends declared and paid by all corporations (foreign and domestic) after the passage and publication of this act and prior to July 1, 1937."

The law was enacted and became effective September 26, 1935. Thus under the original enactment of the law only those dividends declared and paid between September 26, 1935 and July 1, 1937, were subject to a tax. Thus two corporations having the same income would have different amounts of income tax to pay for the year 1936. For example, Corporation *A* declared and paid a dividend September 1, 1937; therefore, it had no additional income tax for 1936. Corporation *B*, on the other hand, declared and paid a dividend June 1, 1937—thereby subjecting itself to an additional income tax for 1936.

6. We have understood that this Court, in reviewing a decision of the State Court, has consistently adhered

to the rule that its function is confined to determining whether the law, as applied to the facts in the case, produced an unconstitutional result; in other words, the decisions of the highest court of the state were controlling as to the meaning and effect of its own laws, and this Court would not interfere unless the decisions produced an unconstitutional result.

In the instant case the Supreme Court of Wisconsin held that the law, as enacted, violated the Fourteenth Amendment to the Federal Constitution. As we understand the decisions in the past, this Court would be bound by such a holding; where, if the converse were true, and the Supreme Court of Wisconsin decided that the law did not contravene the Fourteenth Amendment to the Federal Constitution, when in fact it did, it would be the duty of this Court, under its prior decisions, to reverse the Supreme Court of the State of Wisconsin. We know of no decision of this Court holding otherwise; surely the case of *Henderson v. Wickham*, 92 U. S. 259, 268, 23 L. ed. 543, 547, and the case of *Lawrence v. State Tax Commission*, 286 U. S. 276, 280, 76 L. ed. 1102, 1105, cited in the majority report of *Wisconsin v. J. C. Penney Company*, do not. They support the rule contended for herein. In the case of *Henderson v. Wickham*, the law, as construed by the State Court, violated the Federal Constitution; and this Court reversed. The case, *Lawrence v. State Tax Commission*, does not announce any different rule.

III.

PUBLIC INTEREST.

The principle involved in this case is important, not alone because of the amount of tax involved in the instant case, but also by reason of the departure by the Court from accepted principles governing state taxation. It is impossible to predict the effect this decision may have upon other tax questions involving extra territoriality or upon established conceptions of certain taxes falling within a given classification. We do not wish to be understood as contending that the fact this Court decided this case upon questions not briefed or argued by either side to be outside the province of the Court; but we do feel that due to the importance of this case, not only to this taxpayer but to the public generally, an opportunity be afforded us to present our views upon the foregoing questions.

For the foregoing reasons it is respectfully urged that this petition for a rehearing be granted, and that the judgment of the Wisconsin Supreme Court be, upon further consideration, affirmed.

Respectfully submitted,

FREDERICK J. MILLER,

Ryan Block,

Little Falls, Minnesota,

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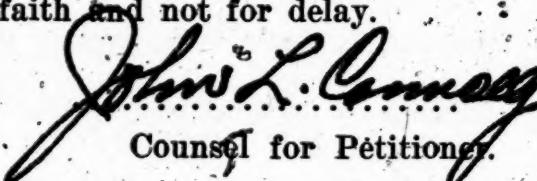
1 West Main Street,

Madison, Wisconsin,

Attorneys for Petitioner.

CERTIFICATE OF COUNSEL.

I, JOHN L. CONNOLY, counsel for the above named Minnesota Mining and Manufacturing Company, do hereby certify that the foregoing petition for a rehearing of this cause is presented in good faith and not for delay.



John L. Connolly

Counsel for Petitioner.

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SUPREME COURT OF THE UNITED STATES.

No. 48.—OCTOBER TERM, 1940.

State of Wisconsin and Elmer E. Bar-
low, as Commissioner of Taxation of
the State of Wisconsin, Petitioners,
vs.

Minnesota Mining and Manufacturing
Company.

On Writ of Certiorari to
the Supreme Court of
Wisconsin.

[December 16, 1940.]

Mr. Justice FRANKFURTER delivered the opinion of the Court.

This case, involving another application of the Wisconsin Privilege Dividend Tax considered in *Wisconsin v. J. C. Penney Co.*, No. 46, decided this day, is governed by that decision except for a contention made by this respondent but not pressed here in *Penney's* case.

The Commerce Clause is invoked. But it is too late in the day to find offense to that Clause because a state tax is imposed on corporate net income of an interstate enterprise which is attributable to earnings within the taxing state, *Matson Navigation Co. v. State Board*, 297 U. S. 441. That liability for such a tax is made contingent upon later happenings, as in the circumstances of the present case, makes no difference.

Reversed and remanded.

The CHIEF Justice, Mr. Justice McREYNOLDS, Mr. Justice ROBERTS, and Mr. Justice REED dissent for the reasons stated in the dissenting opinion in No. 46.

A true copy.

Test:

Clerk, Supreme Court, U. S.

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